Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THEODORE ROOSEVELT JOHNSON, JR.,
Petitioner,

v.

DONALD WYRICK, WARDEN, MISSOURI STATE PENITENTIARY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED FOR REVIEW

I

(A) Does The Eighth Circuit Opinion, Which Applied A "Presumption Of Correctness" To The Presumed "Factual Finding" Of The Missouri Appellate Court "That The Witnesses' In-Court Identifications Were Independent Of Any Improper Procedure" Improperly Expand *Sumner* v. *Mata,* Place That Case In Conflict With *Townsend* v. *Sain,* And Violate Due Process Where The State Appellate Court's "Finding" Was Premised On Its Resolution, Without Hearing, Of "Disputed Historical Facts" Which Turned On The Credibility Of Conflicting Witnesses, And Petitioner Was Denied The Opportunity To Develop Material Facts In The State Courts?; (B) Did The Eight Circuit Itself Violate *Townsend* v. *Sain* By Relying On "The Printed Record" To Resolve These Same "Disputed Historical Facts" Despite "Conflicts In Testimony" And The Absence Of Material Facts?

II

(A) Is The Eighth Circuit's Decision, Which Placed On Petitioner A Threshold Burden Of Proving "Relevancy" In Order To Discover The Identity Of The Police Officer Who Talked To The Confidential Informant Who Provided The Probable Cause For The Arrest Of A Person Other Than Petitoner For The Crime Petitioner Was Convicted Of, In Direct Conflict With *Roviaro* v. *United States*?; (B) Does The Opinion Below, Which Accorded A "Presumption Of Correctness" To "The State Appellate Court's Finding 'That There Is No Indication That The Informant Took Part In The Event Or Was Even Present' " As Grounds For Denying Petitioner A Hearing In The Federal Courts, Misapply *Sumner* v. *Mata* And § 2254(d) Because There Was No "Hearing" Or "Factfinding Procedure" In The State Courts, And The "Material Facts"

Have Never Been "Developed"?; (C) In Making Its Own "Finding" That The Informant Was "A Mere 'Tipster,' " Thereby Approving *Sub Silentio* The District Court's Refusal To Grant A Hearing On This Issue, Did The Eighth Circuit Deny Petitioner The Opportunity "To Establish By Convincing Evidence That The Factual Determination By The State Court Was Erroneous"?

III

(A) Was Petitioner Denied His Right Of Confrontation, And His Rights To A Public Trial, Assistance Of Counsel, And Due Process Of Law, Under The Fifth, Sixth And Fourteenth Amendments To The United States Constitution When The Trial Judge Held A Secret *Ex Parte* Pre-Trial Conference With Law Enforcement Officers, At Which Accusations Were Made That Petitioner "Was A Member Of A Militant Group" And A Tape Was Played Wherein A Voice, Alleged To Be That Of Petitioner, Exhorted Listeners To Racial Violence, On The Basis Of Which The Trial Court Ordered Unusual And Highly Visible Security Measures For The Trial Itself?; (B) Where The State Courts Denied Petitioner A Hearing On The Above Allegations, Did The Eighth Circuit Violate *Townsend* v. *Sain* In Denying Petitioner A Federal Evidentiary Hearing On The Grounds That He "Has Not Presented Any Evidence To Support These Allegations"?; (C) Did The Eighth Circuit Panel Further Depart From *Townsend* v. *Sain* By Assuming The Truth Of The Accusations Against Petitioner At The *Ex Parte* Hearing As A Basis For Ruling That The Security Was " 'Not Unreasonable In Light Of The Circumstances' "; (D) Did The Presence Of Four Uniformed Policemen In The Hallway Between The Courtroom And The Jury Room, Plus The Use Of Two Marked Police Cars And A Uniformed Motorcycle Officer To Accompany The Jurors Between The Courthouse And Their Lodgings, Deprive Petitioner Of The Physical Indicia Of Innocence?

IV

Was Petitioner's Right To Due Process Violated When The State Concealed From Him The Identity Of Witnesses To The Crimes With Which He Was Charged, The Descriptions Of The Robbers Which Witnesses Gave To The Police, The Names Of The Witnesses Who Viewed The Lineup At St. Louis County, And The Notations By Police Officers Of Identifications And Nonidentifications By Witnesses Viewing Lineups?

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OPINIONS BELOW

The Report and Recommendation of United States Magistrate (Noce, J.) is printed herein at A 1-30. The Opinion of the District Court (Wangelin, J.), reported as *Johnson* v. *Wyrick*, 501 F. Supp. 174 (E.D. Mo. 1980), is reprinted herein at A 31-35. The opinion of the Court of Appeals is not yet reported and is reprinted herein at A 36-49.

JURISDICTION

The opinion of the Court of Appeals was filed on July 20, 1981. Petitioner's timely petition for rehearing and suggestions for rehearing en banc were denied on August 14, 1981. This petition for certiorari was filed within ninety days of August 14, 1981. The court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2242:

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a Justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

28 U.S.C. § 2254(d):

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant or the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

At 1:30 a.m., March 18, 1972, five men entered a tavern in St. Louis County and robbed sixty customers. A 37. An off-duty policeman and a customer were killed, and two were wounded. A neighbor, Mark Casey, implicated Robert Toney and Lucious Jones. Exh. 2 649-61. About 7:30 a.m., police entered Toney's house and arrested Toney, Jones, Christopher Davis, and petitioner. Exh. 2 710. A search of the house uncovered items connected with the robbery. Minutes later, Robert Alfred approached the house and was arrested. Exh. 3 754, 758.

That afternoon, a lineup was held in Maplewood. This consisted of five suspects and three officers, and was viewed by Laura Miller, a barmaid, and a few customers. At trial, Ms. Miller claimed that she identified petitioner at this lineup, but this was refuted by Capt. Scavatta and an attorney. Exh. 3 927; Exh. 4 1110-02, 1125-33. After Toney, Davis, Jones, and petitioner were charged, police learned that James Hill had bragged of killing the officer. He was also charged.

On March 21, a lineup was held at St. Louis County headquarters. This included Hill, Toney, Davis, Jones, and petitioner, and was viewed by many witnesses. Defense counsel were placed where they could not hear what the witnesses said. Exh. 3 868-69; Exh. 6 90-100. The witnesses whispered numbers to Sgt. Boulch, and he wrote them down. Exh. 2 702-03, 869-70. Joyce Sullivan said in her deposition that she identified "possibly one" person. Exh. 3 914. At trial, she claimed to have made a positive identification of petitioner. Exh. 3 912-13.

Owen Kelly viewed a videotape of the county lineup. Exh. 6 37-38. He claimed to have made a positive identification of petitioner. Exh. 3 900-01; Exh. 6 38-39. Scavatta testified that Kelly made no such identification. Exh. 4 1120-21. The officer with Scavatta did not testify. Miller testified at the grand jury. The state successfully resisted petitioner's attempts to determine whether she was shown photographs of petitioner or made any identification of him. Exh. 6 59-67.

The prosecutor prepared a large "poster" with individual photographs of Toney, Davis, Jones, Hill and petitioner. Two months after the robbery, all eyewitnesses came to the tavern for a "reenactment." Exh. 3 919, 921, 951; Exh. 6 21, 101-04. All endorsed eyewitnesses were deposed by petitioner. The "poster" and photographs of both lineups were displayed to each eyewitness by the prosecutor at the tavern, again before each witness' deposition, and again immediately before each witness testified at trial. Exh. 3 903-04, 919, 921, 935, 951; Exh. 6 21, 23-24, 42-46, 71-87, 83-87, 101-06, 109-17, 122-23. Petitioner's pre-trial motion to suppress in-court identifications by Miller, Kelly and Sullivan was denied. Exh. 1 46.

All officers who interviewed eyewitnesses were deposed by petitioner. None of them could remember whom they interviewed or what descriptions they received. Boulch could not recall the name of any witness at the county lineup, or any number he wrote down. Petitioner's requests for the names of witnesses interviewed, the descriptions given, the names of witnesses at the second lineup, and whom they identified, were denied, as was his request for Miller's grand jury testimony. Exh. 1 22-31.

At trial, Miller testified that petitioner stood across the bar from her throughout the robbery. Exh. 3 924. Many witnesses had a clear view of this area, but no one else saw a black male there. Exh. 2 459, 461, 480, 482; Exh. 3 971-72, 976-77, 980-87, 1085. Sullivan identified two black males who walked past her to the back room as petitioner and Jones. Exh. 3 910, 913, 916; Exh. 6 13-14. All witnesses in the back room identified these two as Davis and Toney. Exh. 2 456-57, 497-98; Exh. 3 950, 953-54, 964, 967-69, 973-75, 980, 986, 1079, 1083-85. Kelly identified a different robber as Johnson. Exh. 3 897, 902, 916.

Major Lowery, who was in charge of the investigation, testified that Alfred's arrest was based upon information from a confidential informant whose name he did not know because another officer had received the information. Petitioner's request for the name of that officer was denied. Exh. 3 859-61.

Throughout the trial, armed, uniformed officers were stationed in the hallway between the jury room and the court room. Outside the courthouse, the jurors were accompanied by three marked police vehicles. Exh. 4 1319. Petitioner's objections to these procedures were overruled. After petitioner filed his motion for new trial, the trial judge filed an affidavit stating that these arrangements were based upon a pre-trial conference with police officers at which he heard evidence that petitioner was a member of a black militant organization. Exh. 4 1327-30. Petitioner had no notice of this hearing.

Petitioner was convicted of first degree murder, robbery, and assault, and sentenced to two life terms plus 396 years.

On direct appeal, petitioner unsuccessfully attacked the denial of his motion to suppress identifications, contended that refusal to disclose the name of the officer who talked to the informant denied him due process, argued vigorously that the security deprived him of the physical indicia of innocence, and charged that concealment of the names of witnesses, descriptions given to police, and the names of those who viewed the lineups and whom they identified, violated due process. *State* v. *Johnson,* 539 S.W.2d 493 (Mo. App. 1976). Petitioner filed a motion for post-conviction relief alleging that the secret, *ex parte* pretrial hearing violated the Fifth and Sixth Amendments. This motion was dismissed without a hearing or appointment of counsel, which result was affirmed on appeal. *State* v. *Johnson,* 574 S.W.2d 956 (Mo. Ct. App. 1978).

Petitioner then filed a petition for writ of habeas corpus in the District Court raising the above matters. This was denied without a hearing. The Eighth Circuit affirmed, and the petition for rehearing and suggestions for rehearing were denied.

REASONS FOR ALLOWING THE WRIT

I. Applying A "Presumption Of Correctness" To The Presumed "Factual Finding" Of The Missouri Appellate Court "That The Witnesses' In-Court Identifications Were Indepen-

dent Of Any Improper Procedure" Improperly Expands *Sumner v. Mata*, Places That Case In Conflict With *Townsend* v. *Sain*, And Violates Due Process Because The State Appellate Court's "Finding" Was Premised On Its Resolution, Without Hearing, Of "Disputed Historical Facts" Which Turned On The Credibility Of Conflicting Witnesses, And Because Petitioner Was Denied The Opportunity To Develop Material Facts In The State Courts; The Eighth Circuit Itself Violated *Townsend* v. *Sain* By Relying On "The Printed Record" To Resolve These Same "Disputed Historical Facts" Despite "Conflicts In Testimony" And The Absence Of Material Facts.

Prior to trial, petitioner moved to suppress any in-court identifications by Laura Miller, Owen Kelly, or Joyce Sullivan, on the grounds that their reliability had been nullified by suggestive confrontations. In the pre-trial hearing on this motion, Johnson called these eyewitnesses. The state called no witnesses.

Miller viewed Johnson in a lineup at the Maplewood Police Station the day of the robbery. Sullivan was summoned to the St. Louis County Police Department three days later for a lineup which included petitioner. Kelly was shown a videotape of the County lineup and a photo of one of the lineups.

Months later, the state called witnesses to the tavern for a "reenactment." Exh. 3 919, 921, 951; Exh. 6 21, 101-04. In the fall, petitioner deposed those witnesses whom the state had endorsed. The prosecutor prepared a cardboard "poster" bearing the individual photographs of the five defendants with their names underneath. At the "reenactment," on the day of the depositions, and prior to their in-court testimony, the witnesses were shown this "poster" and lineup photographs. Exh. 3 903-904, 919, 921, 935, 951; Exh. 6 21, 23-24, 42-46, 71-87, 101-106, 109-117, 122-23. When Johnson requested production of this "poster" at the hearing, the judge responded: "This is getting to be silly, and I want the record to show this. This is silly." Exh. 6 115. He ruled: "The Court finds: That the lineups conducted herein were proper; that the pictures viewed herein

were proper; . . . that defendant's constitutional rights were not violated in the viewings theretofore mentioned." Exh. 1 46.

At trial, Miller identified Johnson as one of the robbers, and claimed to have identified him "positively" at the lineup. Exh. 3 926-27. However, Captain Scavatta, the officer who conducted the lineup, testified that she "positively identified a Christopher Davis." "[S]he stated one or two people looked familiar. No positive identification other than Davis." Exh. 4 1102.

Frank Anzalone, an attorney called to observe, stood at Miller's elbow. He testified that Miller "said first of all, the one in the plaid jacket" (number 2-Davis) "looks like the one that appeared behind the bar." "[T]he stocky one with the mustache" (number 3-a police officer) " 'I think he was one of them.' " " 'Maybe the one at the end' " (number 8-police officer). " 'The other one in black *looks*[1] familiar' " (number 7-petitioner). "Off. Scavatta then asked her, 'Are you sure, or positive about any of them?' She said 'I'm sure about the one in red [number 2-Davis], and the one in blue [number 3-a police officer].' " Exh. 4 1132-33. Miller admitted that she "remember[ed] saying the other one in black, indicating Mr. Johnson, looks familiar." She stated that number 3 "was not the police officer that I had picked out." Exh. 3 937.

Kelly also made an in-court identification of petitioner, and claimed to have made a positive identification when he viewed the videotape and photograph. Exh. 3 900-01; Exh. 6 38-39. Scavatta, who showed the videotape to Kelly, testified that Kelly made no such identification. Exh. 4 1120-21. The other officer present when Kelly viewed the videotape did not testify.

In her deposition, Sullivan testified that she had identified "possibly one" person in the lineup. Exh. 3 914. At trial, she too made an in-court identification of petitioner, and claimed to have made a positive identification of him at the lineup.

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[1] Emphasis has been added in this petition unless otherwise noted.

Petitioner requested a hearing in the district court on his claim that these identifications violated due process. Traverse 4. This was not granted. The magistrate recognized that "[t]he repeated viewing of petitioner's photograph by the witnesses creates the possibility that their in-court identification of petitioner was based on the photographs rather than their view of the robber at the time of the crime" and "assum[ed] this procedure was unnecessarily suggestive." A 14-15.[2] *Without a hearing,* he resolved three issues of "disputed historical fact" and found that Miller, Kelly, and Sullivan made positive identifications at the lineups. A 13, 16. The testimony of Scavatta and Anzalone was not mentioned. Having found that the witnesses made positive identifications at their first opportunity, the magistrate drew the only conclusion he could draw from such findings—that the in-court identifications were "reliable." A 16.

The Eighth Circuit read language in the state opinion affirming petitioner's conviction[3] as "a factual finding that the witnesses' in-court identifications were independent of any improper procedure" and accorded it a "presumption of correctness" under *Sumner* v. *Mata,* 101 S. Ct. 764 (1981). A 39-41. The panel then made its own finding from the record that Miller, Kelly, and Sullivan "had also identified Johnson at the lineup prior to being shown the somewhat suggestive cardboard photo display" (A 42), thus resolving critical issues of "disputed historical fact." The testimony of the officer who conducted the lineup and the attorney/observer was rejected

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[2] The magistrate's "assum[ption]" was mandated by *United States* v. *Dailey,* 524 F.2d 911, 913-16 (8th Cir. 1975): "[S]howing Dailey's photographs to the witness the day he was to testify was impermissibly suggestive. By showing only Dailey's photograph to the witness, government counsel in effect said 'This is the man.' " Petitioner's photo was shown to Kelly a "minute" before he took the stand. Exh. 3 904.

[3] *State* v. *Johnson, supra,* 539 S.W.2d at 519.

because it "goes to the credibility of the barmaid [and Kelly] and not to the constitutionality of the lineup procedure itself."[4] A 42 nn. 3-4. Sullivan's deposition testimony that she identified "possibly one" person at the lineup was not mentioned.

A. The Opinion Below Improperly Expands *Sumner* v. *Mata*

Assuming that the state appellate court made a "factual finding" that the "identifications were independent" of the suggestive confrontations, the question is what historical facts it assumed as a basis therefor. With regard to Miller and Sullivan, the *only* "facts" stated relating to the reliability of their identifications were the "fact" that Miller "testified that she identified appellant" at Maplewood and the "fact" that Sullivan "testified that she picked out defendant" at the County lineup. 539 S.W.2d at 518-19. Thus, if the Missouri Court of Appeals made the finding attributed to it by Judge Gibson, it must have accepted as correct Miller's and Sullivan's testimony that they identified Johnson at the lineups. Acceptance of Miller's testimony required rejection of the testimony of the officer and the attorney (which was quoted in Appellant's Brief in *State* v. *Johnson* 174-75). The state appellate court specifically stated that Kelly "was able to identify defendant with certainty" when he saw the video tape. 539 S.W.2d at 519. This "finding" also necessarily rejects Scavatta's testimony. The state court ignored Sullivan's inconsistent deposition testimony.

There is no law in Missouri authorizing an appellate court to resolve conflicting testimony or make "findings of fact" on contested issues from reading a transcript. In Missouri, "questions concerning the credibility of witnesses" are "never reviewable by the appellate court." *Adams* v. *American Paving & Constr. Co.*, 488 S.W.2d 283, 284 (Mo. App. 1972). If the Missouri opinion included "a factual finding that the witnesses' in-court identifications were independent of any improper pro-

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[4] Capt. Scavatta and Anzalone are referred to simply as "rebuttal witnesses" and are not otherwise identified. A 42 n.3.

cedure," then the Missouri Court of Appeals violated its own rules. Moreover, by this reading, the State court stands convicted of a fundamental due process violation:

> [I]n criminal cases Chief Justice Hughes' much cited statement, "The one who decides must hear," . . . applies in full force . . . . Due process forbids that, when an issue of fact is presented, a man should be sent to prison without the trier of the facts having seen and heard his accusers and himself, if he desires to testify, and weighing their credibility in the light of their demeanor on the stand.

United States ex rel. Graham v. *Mancusi,* 457 F.2d 463, 469 (2d Cir. 1972).

In *Louis* v. *Blackburn,* 630 F.2d 1105, 1109 (5th Cir. 1980), the issue was whether a district judge could, without a hearing, " '*reject* a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal,' " 630 F.2d at 1109 (emphasis in original), a question left open in *United State* v. *Raddatz,* 100 S. Ct. 2406, 2415 n.7 (1980). The court held that due process requires a hearing:

> One of the most important principles in our judicial system is the deference given to the finder of fact who hears the live testimony of witnesses because of his opportunity to judge the credibility of those witnesses. . . . The Supreme Court has emphasized, in cases that involve the constitutional rights of criminal defendants, that factual findings may not be made by someone who decides on the basis of a cold record without the opportunity to hear and observe the witnesses in order to determine their credibility . . . . An exception to this general rule was created, however, in *Raddatz.* Due to the procedural safeguards contained in the statute, a district judge may accept a magistrate's findings concerning credibility and not violate due process. *We feel that this reaches to the limits of due process.*

In *Sumner,* there were no "disputed historical facts." The issue was what conclusions were to be drawn from agreed-upon facts—a "determination" which the state appellate court was in as good a position to make as a trial court because it did *not* involve questions of credibility. Thus, on its facts, there is no tension between *Sumner* and *Townsend* v. *Sain,* 372 U.S. 293 (1963). Because the judge who heard the motion believed that the display of the "poster" and lineup photographs to the witnesses was "proper," neither he nor the trial judge was concerned as to whether the in-court identifications were "independent" of this "procedure." Therefore, there was no occasion for the trial court to weigh the credibility of either the eyewitnesses, the police captain, or the attorney, or to consider whether one or more of the witnesses identified Johnson at the lineups. It is a necessary concomitant of Judge Gibson's interpretation that the state appellate court arrogated to itself the right to judge the credibility of the witnesses, and to reject the testimony of Capt. Scavatta and the attorney. The Eighth Circuit's opinion utilizes *Sumner* to stamp its imprimatur on such arrogation. Such an interpretation of *Sumner* is in direct conflict with the principle of *Townsend* that "disputed historical facts" resulting from "conflicts in testimony" may be resolved only after an evidentiary hearing, and not from a printed record: "Where an unresolved factual dispute exists, demeanor evidence is a significant factor in adjudging credibility. And questions of credibility, of course, are basic to resolution of conflicts in testimony." 372 U.S. at 321-22, 321 n.12.[5]

As to Sullivan and Miller, the Eighth Circuit's application of 28 U.S.C. § 2254(d) to the state appellate decision was also erroneous because "the material facts were not adequately developed at the State Court hearing." 28 U.S.C. §§

[5] Judge Gibson's opinion is also in obvious conflict with opinions in other circuits: *Perkins* v. *LeFevre,* 642 F.2d 37, 41 n.3 (2d Cir. 1981); *United States ex rel. Choice* v. *Brierly,* 460 F.2d 68, 73 (3d Cir. 1972); *Harris* v. *Oliver,* 645 F.2d 327, 331 (5th Cir. 1981); *Stotts* v. *Perini,* 427 F.2d 1296, 1299 (6th Cir. 1970).

2254(d)(2-3, 6). Sullivan testified that she whispered three numbers to Sgt. Boulch, but could not remember which three. Exh. 6 20. Boulch did not remember the numbers, but made notes of them. Exh. 2 703, 709. The state successfully concealed these notes. If the district court had granted petitioner's request for a hearing, Boulch's notes could have been used to refresh his recollection or introduced as past recollection recorded.[6] Certainly, Boulch's recordation of whether Sullivan identified petitioner at the lineup was not only "material" but critical to the "reliability" of her in-court identification.

Whether a suggestive confrontation occurred when Miller appeared before the grand jury, and whether she made an identification at that time, are "material facts" which petitioner was barred from developing.

The Eighth Circuit's reliance on *Sumner* v. *Mata* to deny petitioner a hearing expands that decision beyond recognition, creates irreconcilable tension between *Sumner* and *Townsend*, and violates a fundamental tenet of due process.

B. The Opinion Below Conflicts With *Townsend* v. *Sain*

The Eighth Circuit made its own "factual findings": "*These witnesses had also identified Johnson at the lineup . . . .*" A 42. This result is incompatible with *Townsend* and with decisions in the Second, Third, Fifth and Sixth Circuits.[7] Although the briefs and arguments centered[8] on the magistrate's refusal to hold a hearing on the "conflict of testimony" between the eyewitnesses on the one hand, and the police officer and attorney on the other, this issue was relegated to a footnote:

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[6] *State* v. *Bradley*, 234 S.W.2d 556, 560 (Mo. 1950).

[7] See n.5 *supra*.

[8] The attorney general did attempt to justify the "poster" as being a "five-man lineup" which was non-suggestive because "[e]ach of the witnesses could identify only two of the five men depicted" and "[t]he witness had no way of knowing that the three persons they could not

> Johnson argues that the barmaid's identification of him at the initial lineup is questionable. At trial, the barmaid testified that she identified Johnson at the time of the lineup. Johnson produced rebuttal witnesses that implied the barmaid did not identify Johnson. This issue, however, goes to the credibility of the barmaid and not to the constitutionality of the lineup procedure itself.

A 42 n.3. This is a *non sequitur*. First, no one ever claimed that the question of whether the witnesses identified petitioner at the lineups went "to the constitutionality of the lineup procedure itself." Secondly, the testimony of Scavatta and Anzalone was affirmative evidence of the witnesses' inability to identify Johnson at the initial confrontations. It was admissible for this purpose on the issue of "reliability" without regard to whether the eyewitnesses testified about the lineups at all. To add the obvious, to say that "conflicting testimony" goes to the "credibility" of the state's witnesses is an argument *for*, not against, the hearing required by *Townsend*.

In addition to its findings that each witness identified Johnson at the lineup, the Eighth Circuit based its determinations that the identifications were "reliable" on the following factors: *Miller* said that the robber she identified as Johnson stood across from her under a bar light for three minutes; this same person was in the bar "that afternoon to buy popcorn or potato chips." *Sullivan* focused attention on the robber who "walked past her table" because he "was a black male and car-

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identify were participants in the crime." Brief of Appellee 14-15. The difficulty with this is that the state could not lose with such a "lineup"—since all five participants in the "lineup" were defendants, whichever ones the witnesses chose would be the "correct" selections. Moreover, even if the "poster" is construed as a "lineup," it was a different lineup from those initially viewed. Exposing witnesses to different lineups with the same defendant was condemned by this Court in *Foster* v. *California*, 394 U.S. 440, 442-43 (1969). Although the Eighth Circuit did refer to respondent's argument, it wisely refrained from basing its decision thereon.

ried a shotgun" and "[b]oth of these factors were unusual at the tavern."[9] *Kelly* focused attention on the robber in the doorway because he "was a black male and carried a shotgun" and "[b]oth of these factors were unusual at the tavern."

Judge Gibson's opinion did not mention those factors which militate against reliability: *Miller* gave no description of the robber who "stood almost directly in front of her under a bar light for almost three minutes." Exh. 4 1108-09; Exh. 6 50-51.[10] *Sullivan* gave only a "comparative" description—the participant she identified as Johnson was "shorter, and he was lighter complected" than the other robber. Exh. 3 918; Exh. 6 43. She saw the robbers for no more than two seconds[11] in dim light. Exh. 2 468, 501. Sullivan's "Johnson" had passed behind her before Kelly's "Johnson" entered the tavern. Exh. 3 897, 910, 915-16; Exh. 6 13-14, 47-48. Ten witnesses in the back room identified the shorter of these two robbers as Toney, and six identified the taller one as Davis. *Kelly's* description of the robber he identified as petitioner was that he was a "Negro male." Exh. 2 527. He saw this person for "two or three seconds" at most. Exh. 3 906. Kelly's "Johnson" was standing in the doorway after Sullivan's "Johnson" had passed behind her.

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[9] It would seem that the fact that the person walking past her carried a shotgun would be sufficiently "unusual" to focus Sullivan's attention without regard to whether he "was a black male." However, Judge Gibson relied on a non-existent factor, because neither Sullivan nor Kelly testified that the robbers whom they identified as Johnson were carrying shotguns. Exh. 3 897, 910. Thus, if Kelly and Sullivan did not make lineup identifications, the only basis for holding their in-court identifications to be "reliable" would be that Johnson is a "black male" and the robbery occurred in an all-white tavern.

[10] Miller talked to an officer immediately after the robbery, but gave no descriptions. Exh. 6 51. Before viewing the lineup, she described "one subject" who "came behind the bar" and another who "went to the backroom of the bar," but did not "mention" "any other person or attempt to describe any other persons." Exh. 4 1109.

[11] The table at which Sullivan was seated was only four to five feet from the door. Exh. 3 897-98. The robber she identified as petitioner walked past her to the back room without pausing. Exh. 3 917.

Subtracting the Eighth Circuit's factual finding that Kelly and Sullivan picked petitioner out of the lineup from the "*Neil* v. *Biggers* factors" leaves nothing on which to base a determination of "reliability." If Capt. Scavatta and Anzalone are believed, and Miller could not identify Johnson at the Maplewood lineup, the "three minute" opportunity to view a robber standing "directly in front of her under a bar light" is converted from a strong factor favoring "reliability" to an insuperable bar to such a finding, for it is most unlikely that, if she had seen this person in a lineup eleven hours later, she could not have identified him (especially since she accurately identified Davis, whom she had seen for a much shorter time).

Thus, the Eighth Circuit's election, based on the cold record, to believe the testimony of Miller and Kelly that they identified Johnson at the lineup, and to disbelieve the testimony of the police officer and the attorney that they did not, not only violated due process, but was the only possible basis for finding that the identifications were "reliable."

Moreover, in making "findings," the Eighth Circuit approved *sub silentio* the refusal of the district court to accord petitioner a hearing. Even if the "determinations" which the court read into the state opinion were entitled to a "presumption of correctness," petitioner was entitled, under *Sumner,* to an opportunity "to establish by convincing evidence that the factual determination by the state court was erroneous." 101 S. Ct. at 771. By stepping down from its role of appellate court to that of fact-finder, the Eighth Circuit denied petitioner this opportunity.

Conclusion

Eight state and federal judges have written or concurred in opinions on this issue. In every opinion, the claims of Miller, Kelly, and Sullivan that they identified Johnson at the lineup have been set forth in support of the conviction. Not a single judge has mentioned that the police officer who conducted the lineup testified that Miller did not identify Johnson at the

lineup. Not a single judge has referred to Capt. Scavatta's testimony that Kelly made no identifications when he viewed a videotape of the lineup. Sullivan's deposition statement "possibly one" has never appeared in an opinion. None of the judges who, from the printed record, have found both Kelly's and Sullivan's identifications "reliable" have mentioned the fact that they each identified different participants in the robbery as Johnson. No judge has ever attempted to justify the absence of Sgt. Boulch's notes of Sullivan's lineup observations. The trial court's refusal to allow Johnson to discover whether a photographic confrontation occurred when Miller testified at the grand jury has never been discussed in an opinion. Nowhere in the Eighth Circuit opinion is there any reference to the fact that petitioner was denied a hearing in the district court.

Neither the magistrate, the honorable district judge, the Attorney General of Missouri, nor any member of the United States Court of Appeals for the Eighth Circuit has ever given petitioner any reason why he should not have had a hearing on his petition for a writ of habeas corpus.

There is no reason.

II

The Eighth Circuit's Decision, Which Placed On Petitioner A Threshold Burden Of Proving "Relevancy" In Order To Discover The Identity Of The Police Officer Who Talked To The Confidential Informant Who Provided The Probable Cause For The Arrest Of A Person Other Than Petitioner For The Crime Petitioner Was Convicted Of, Is In Direct Conflict With *Roviaro* v. *United States;* The Opinion Below, Which Accorded A "Presumption Of Correctness" To "The State Appellate Court's Finding 'That There Is No Indication That The Informant Took Part In The Event Or Was Even Present' " As Grounds For Denying Petitioner A Hearing In The Federal Courts, Misapplies *Sumner* v. *Mata* And § 2254(d) Because

There Was No "Hearing" Or "Factfinding Procedure" In The State Courts, And The "Material Facts" Have Never Been "Developed"; In Making Its Own "Finding" That The Informant Was "A Mere 'Tipster,' " The Eighth Circuit Approved *Sub Silentio* The District Court's Refusal To Grant A Hearing On This Issue, And Thus Denied Petitioner The Opportunity "To Establish By Convincing Evidence That The Factual Determination By The State Court Was Erroneous"

Six hours after the holdup, Robert Alfred walked onto the porch of Toney's house and was arrested. Exh. 3 754, 758. Major Lowery was asked about this:

> Q . . . Now, Major, was Robert Alfred—you were aware that he was arrested at or near the front porch of the Banneker address on March 18?
>
> A Yes, I am.
>
> Q And was this based on information which you had received from a confidential informant?
>
> A No, sir, I don't think I received the information; it was received by another member of the squad.
>
> Q . . . . Who received it?
>
> A I can't recall. I don't know, sir.
>
> Q Is that included in one of your reports?
>
> A It should be, sir.
>
> Q And who was that informant, sir?
>
> A I don't know who the informant was, sir.
>
> Q Is that included in one of your reports?
>
> A The informant's name would not be included in the report. That's confidential.
>
> . . . .

MR. KIMBRELL: Your Honor, at this time I will ask this be disclosed to defendant, as to information being favorable to defendant on the order of Judge Ferriss.

THE COURT: The request is denied. Mr. Kimbrell, if I understand it, this information involves the question of Alfred being involved?

MR. KIMBRELL: Beg your pardon?

THE COURT: The request is denied.

Exh. 3 859-61. In his petition, Johnson argued that the denial of his request for the identity of the police officer violated due process, and asked for a hearing. Traverse 4. His contention was rejected without a hearing. The Eighth Circuit affirmed:

> *It is apparent to us that the trial court denied Johnson's request for the identity of the police officer, not on grounds of privilege, but rather on the grounds of relevancy, namely, that Alfred's possible involvement in the robbery had not been demonstrated to the extent necessary to justify this collateral inquiry.* We agree, and find that the trial court did not commit any constitutional error in this regard.

A 45.

A. This Decision Conflicts With *Roviaro* v. *United States*

It is impossible to reconcile this rationale with *Roviaro* v. *United States,* 353 U.S. 53, 60-62 (1957):

> A . . . limitation on the application of the [informer] privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identification, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.
>
> . . . .

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense.

In petitioner's case, as in *Hampton* v. *Hanrahan*, 600 F.2d 600, 637 (7th Cir. 1979), "[t]he trial judge never attempted to apply the *Roviaro* balancing test or to determine whether disclosure was essential to a fair determination" of the case. Recognizing this, the Eighth Circuit has created three new hurdles for defendants invoking *Roviaro*. First, the trial judge need not concern himself with *Roviaro* unless he finds that the informant's information is "relevant." Secondly, the defendant bears the burden of "demonstrat[ing]" that "relevancy" "to the extent necessary to justify" a "collateral inquiry." Third, he must somehow manage to meet this burden from his own resources, for he is not entitled to help or discovery from the state in doing so. The specific holding of the Eighth Circuit may be stated as follows: a defendant has no constitutional right to disclosure of the name of the police officer who talked to a confidential informant unless he can first demonstrate what information the informant gave to that officer.

In other words, Judge Gibson's opinion has placed on defendants the burden of proving the "contents" of the informant's "communication" when that information is under the exclusive control of the state, and then made it impossible for defendants to meet this burden by denying them access to the only avenue by which they could obtain it. This is a classic "Catch-22."

B. The Opinion Below Misapplies *Sumner* v. *Mata*

The circularity of the Eighth Circuit's reasoning is further demonstrated by its application of *Sumner* v. *Mata* to this issue also. Immediately after quoting two full paragraphs from the opinion of the Missouri Court of Appeals, the Eighth Circuit makes the all-encompassing statement that: "These findings are

entitled to a presumption of correctness." A 43-44. Later, the panel declares: "We agree with the state appellate court's finding that there is no indication 'that the informant took part in the event or was even present.' " A 44.

First, this use of *Sumner* was totally inappropriate because the state proceedings lack the most fundamental prerequisite for application of 28 U.S.C. § 2254(d): "[A] determination *after a hearing on the merits* of a factual issue, made by a State court . . . shall be presumed to be correct . . . ." There was no hearing.

A second reason why *Sumner* v. *Mata* had no bearing on this issue is the clear applicability of at least three of the exceptions to § 2254(d), stating that the presumption shall not apply if "the applicant shall establish . . . . (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing; (3) that the material facts were not adequately developed at the State court hearing; . . . . (6) that the applicant did not receive a full fair, and adequate hearing in the State court proceeding; . . ." 28 U.S.C. §§ 2254(d)(2-3, 6). Again, there was no "hearing." There was no "factfinding procedure employed by" any state court. The following "material facts" were not "developed": The name of the officer; the identity of the informant; the "contents of his communication"; or whether the informant's knowledge was first-hand.

C. *Sumner* v. *Mata* Does Not Justify The Lack Of A Hearing

The Eighth Circuit made its own "factual determinations" from a meagre record when it "agree[d]" with the state appellate court "that there is no indication 'that the informant took part in the event or was even present,' " and categorized him as "a mere 'tipster.' " It also "agree[d]" with what it perceived to be the trial court's view—"that Alfred's possible involvement in the robbery has not been demonstrated to the extent necessary to justify this collateral inquiry." A 42.

By making its own findings of fact, the Eighth Circuit again approved *sub silentio* the district court's refusal to hold a hearing. In so doing, it read *Sumner* as holding that, once a federal court has accorded a "presumption of correctness" to a factual statement in a state opinion, the only further inquiry to be made is whether that statement is "fairly supported by the record." 28 U.S.C. § 2254(d) (8). This ignores the language of *Sumner* placing the "burden" on "the applicant to establish by convincing evidence that the factual determination by the State Court was erroneous." 101 S. Ct. at 771. The only way petitioner could "establish" anything was through the hearing he requested.

In other words, the Eighth Circuit has read *Sumner* as obviating the need for a hearing whenever there is a factual statement in a state appellate opinion to which § 2254(d) could be applied. Petitioner interprets *Sumner* as allocating to the applicant the burden of going forward with the evidence and the risk of non-persuasion, but having no bearing on the issue of whether a hearing is required where an applicant has pled facts contrary to those "reliably found" by a state appellate court. If petitioner's view is the right one, correction of the Eighth Circuit's erroneous interpretation is most important. In the instant case, petitioner pled that the informant has "first-hand knowledge of the crime," and that his "testimony could have exculpated Petitioner." Petition 11. Even if the state opinion created a "presumption" that these facts were untrue, petitioner was entitled to an opportunity to put on evidence to "establish" that he was right and the state court of appeals was wrong. The fact that the informant's "probable cause" was passed from the informant to the unidentified officer to the arresting officers in less than six early morning hours makes it highly probable that his knowledge of who the robbers were was direct.[12]

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[12] Judge Gibson's "finding" that "Alfred's possible involvement in the robbery had not been demonstrated" overlooks the state's evidence that Alfred fired a shotgun the night of the robbery. Exh. 3 1061.

By labeling the informant as "a mere 'tipster' " (A 42), the Eighth Circuit lumped the instant case with those holding that disclosure of the identity of such an informant is not required. However, in those cases,[13] the "tipster" provided information which led either to a search of the defendant's property or to his arrest. Since the "tipster's" information was *unfavorable* to the defendant, it was fair to presume that his disclosure would not help the defendant, absent evidence to the contrary. In the instant case, the informant's communication pointed towards the guilt of someone other than petitioner for the crime with which petitioner was charged. The presumption in this instance must be that his information would be helpful to petitioner, and cast the burden on the state of either showing otherwise, or justifying non-disclosure because of danger to the informant.

There is nothing to indicate that "the public interest" would be affected in the least by disclosure of the identity of either the officer or the informant, or by revealing the contents or source of the information. The state has never contended that disclosure would have endangered anyone. *United States* v. *Fernandez*, 506 F.2d 1200, 1202 (2d Cir. 1974). When Johnson asked for the name of the informant, the prosecutor did not assert the "informer privilege"; nor did he do so when counsel requested the name of the officer.

Conclusion

Neither the prosecutor, the attorney general, the trial judge, the state court of appeals, the magistrate, the district judge, or the Eighth Circuit, has ever stated even the flimsiest of rationales for concealing from petitioner the name of the police officer who talked to the informant. Placing the burden upon Johnson to prove that the informant possessed evidence which was "relevant and helpful" to him, and then making it impossible for him to meet this burden by denying him, without any

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[13] See A 44; Br. of Appellee 20-21.

justification or explanation, the name of the only person through whom he could do so, is grossly unfair. The decision invites prosecutors to avoid *Roviaro* by concealing the identities of officers who talk to informants. Such a nullification of the purposes of this Court's decision cries out for review.

III

Petitioner Was Denied His Right Of Confrontation, And His Rights To A Public Trial, Assistance Of Counsel, And Due Process Of Law When The Trial Judge Held A Secret *Ex Parte* Pre-Trial Conference With Law Enforcement Officers, At Which Accusations Were Made That Petitioner "Was A Member Of A Militant Group" And A Tape Was Played Wherein A Voice, Alleged To Be That Of Petitioner, Exhorted Listeners To Racial Violence, On The Basis Of Which The Trial Court Ordered Unusual And Highly Visible Security Measures For The Trial Itself; Where The State Courts Denied Petitioner A Hearing On The Above Allegations, The Eighth Circuit Violated *Townsend* v. *Sain* In Denying Petitioner A Federal Evidentiary Hearing On The Grounds That He "Has Not Presented Any Evidence To Support These Allegations"; The Eighth Circuit Panel Further Departed From *Townsend* By Assuming The Truth Of The Accusations Against Petitioner At The *Ex Parte* Hearing As A Basis For Ruling That The Security Was " 'Not Unreasonable In Light Of The Circumstances' "; The Presence Of Four Uniformed Policemen In The Hall Between The Courtroom And The Jury Room, Plus The Use Of Three Marked Police Vehicles To Accompany The Jurors Between The Courthouse And Their Lodgings, Deprived Petitioner Of The Physical Indicia Of Innocence.

The hall through which petitioner's jury passed from the deliberation room to the courtroom was patrolled by four uniformed officers. Exh. 1 111, 205-06. Whenever the jurors were outdoors, they were accompanied by three marked police vehicles. Exh. 4 1319, 1328. Petitioner's objections to this unusual security, and the atmosphere it created, were overruled.

In his motion for new trial and on direct appeal, Johnson vigorously complained that the security measures were unjustified and violated due process. Exh. 5 265-67; Appellant's Brief in *State* v. *Johnson* 276-82. The Missouri Court of Appeals ruled: "The measures taken were not unreasonable in light of the circumstances." 539 S.W.2d at 514.

In his state post-conviction application, appellant raised the precise point set forth above. This contention was denied by the state courts without a hearing or appointment of counsel. This precise point was set out in the habeas petition, and a hearing requested thereon (Traverse 4), but the magistrate treated the question as being solely "one of unreasonable and prejudicial trial security," and dismissed the claim without a hearing:

> The only security measure which arguably could have had an effect on the jury's impartiality was the police escort. In light of the judge's information, this security measure was reasonable to protect the jury. . . . Considering the special circumstances, it was not an abuse of discretion of constitutional magnitude to take added security precautions . . . .

A 29. The district judge accepted this without comment.

A. The Ex Parte Hearing Violated Constitutional Rights

The substantive issue is whether, when a trial judge holds a pre-trial conference with law enforcement officials for the purpose of deciding whether to order unusual security measures for the trial, and hears evidence with regard to the necessity for such measures, a defendant has any right to be notified of this meeting, to be present, to be represented by counsel, to cross-examine the officers, or to present evidence contradicting that of the state. This appears to be a case of first impression.

The strictures against *ex parte* inquiries, and the reasons therefor, are fundamental to due process. For example, in *Rinehart* v. *Brewer,* 561 F.2d 125, 132 (8th Cir. 1977), the state trial judge privately interviewed the physician whom he had ap-

pointed to examine the defendant, and obtained information not found in the doctor's written report. The Eighth Circuit held that this "undisclosed *ex parte* inquiry constituted improper conduct which denied Rinehart his due process right to a disinterested and impartial tribunal." 561 F.2d at 132.

In his brief below, respondent argued that a trial judge has an unfettered right to make any *ex parte,* pre-trial inquiries concerning a defendant that he deems fit for purposes of deciding whether to order unusual trial security. Br. of Appellee 23-26. In the only case he cited which is even remotely on point, *United States* v. *Gambina,* 564 F.2d 22 (8th Cir. 1977), the district judge "conducted hearings to determine whether security measures were necesary." Gambina was *present* at these hearings and had the right to cross-examine and present evidence.

Neither respondent nor any judge has stated any reason for excluding petitioner from the conference and denying him an opportunity to challenge the accusations against him.

B. The Eighth Circuit Violated *Townsend* v. *Sain*

The Eighth Circuit avoided the issue of whether the secret hearing was improper, apparently on three grounds. First:

> In his brief, Johnson alleges that the state trial court held a secret, *ex parte* pre-trial conference with law enforcement officers, wherein allegations were made that he was a "militant" and a tape recording was played wherein his voice exhorted listeners to racial violence. *Johnson,* however *has not presented any evidence to support these allegations.*

A 45 n.6. These allegations did not originate in Johnson's brief, but were contained in petitioner's *verified* motion filed in the district court. "In a petition for a writ of habeas corpus, verified by the oath of the petitioner, . . . facts duly alleged may be taken to be true, unless denied by the return, or controlled by other evidence." *Witten* v. *Tomlinson,* 160 U.S. 231, 242

(1895). If allegations in a § 2254 motion did not create a sufficient presumption of the truth thereof to require a hearing, or, at least, rebuttal, the requirement that the motion be "verified" would be meaningless. The district court did not attempt to "employ" the "variety of means" set out by this Court in *Blackledge* v. *Allison,* 431 U.S. 63, 80-83, 82 n.25 (1977), which might "avoid the need for an evidentiary hearing." Johnson was given no "opportunity for presentation of the relevant facts." *Harris* v. *Nelson,* 394 U.S. 286, 298 (1969).

In short, the Eighth Circuit affirmed the dismissal of Johnson's petition without a hearing, even though the state courts had refused to grant him a hearing on this issue, and did so on the grounds that he "has not presented any evidence to support these allegations." This is intolerable.

C. The Court Below Assumed The Accusations Were True.

One alternative ground which the Eighth Circuit adopted to avoid the issue raised by petitioner was:

> On direct appeal, the state appellate court held that the presence of four uniformed policemen outside the courtroom and two plain-clothes security officers inside the courtroom[14] was "*not unreasonable in light of the circumstances.*" *State* v. *Johnson,* 539 S.W.2d at 514. The federal magistrate in his report and recommendation came to the same conclusion. We also agree.

A 46. At the time the judge ordered the jury convoy, the only "circumstance" of which he was informed which could possibly justify the "convoy" which accompanied the jury was the "circumstance" that "[t]he court was . . . informed that defendant was a member of a militant group some of whose members were attending the trial." 539 S.W.2d at 514. Yet, it was this very ac-

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[14] The opinion did not mention the marked police vehicles which accompanied the jurors from the motel and the courthouse daily.

cusation, made behind petitioner's back by the police, which he was denied any opportunity to challenge or refute. In other words, the Eighth Circuit has assumed the truth of the secretly adduced evidence against petitioner in order to hold that he was not harmed by his inability to contest it.

D. Petitioner Lost The Physical Indicia Of Innocence.

The third ground for dismissing this claim without a hearing was that "no prejudice resulted from the security measures imposed by the state trial court." A 46. The state trial and appellate courts, the attorney general, the magistrate, and the district judge all attempted to justify the security on the grounds that it was called for by the information that Johnson "was a member of a militant group." 539 S.W.2d at 514; Respondent's Brief in *State* v. *Johnson,* at 153-57; Brief of Appellee 23-26; A 27-29, 30-35. The Eighth Circuit's statement marks the first time that anyone has claimed that, even if the security was not justified, Johnson suffered "no prejudice" from it.

The question is whether the security deprived petitioner "of the physical indicia of innocence." *United States* v. *Jackson,* 549 F.2d 517, 527 (8th Cir. 1977). The vice of the "precautions" used is that they were so "extraordinarily obvious." *Dennis* v. *Dees,* 278 F. Supp. 354, 357 (E.D. La. 1968). "In the modern courtroom as little show of arms must be made as possible, . . ." *Id.* Other circuits recognize that any unusual display of uniformed, armed security is inherently prejudicial. "[A]ny presence of guards other than an unobtrusive complement of security officers, is *bound* to have some prejudicial effect . . . ." *United States* v. *Samuel,* 431 F.2d 610, 615 (4th Cir. 1970). In *Kennedy* v. *Cardwell,* 487 F.2d 101, 108-09 (6th Cir. 1973), the court warned that "the use of excessive guards" could create an "atmosphere" of "partiality." The Court in *Dorman* v. *United States,* 435 F.2d 385, 398 (D.C. Cir. 1970) took a:

> strigent view of any action which creates an atmosphere of danger in a trial. Trials should be conducted in an at-

> mosphere of impartiality; the jury should be allowed to weigh the evidence without feeling the terror of impending doom if they acquit the defendant. When a judge conducts a trial in a way that can only impress upon the jury the dangerousness of the men on trial, this impartial search for truth aborts.

Petitioner and four other black males were accused of: murdering a white police officer and a white businessman, shooting a white attorney, stabbing a white barmaid, and robbing sixty white customers. The judge, the prosecutor, all of the jurors, all of the state's witnesses, and all of the uniformed officers used for security in Johnson's trial were white.

Although the state's evidence showed that Johnson did not personally shoot, stab, or hit anyone, the jury assessed a total of 396 years on the robbery and assault counts, plus life sentences on the murder counts. In contrast, Toney's jury assessed a total of 12 years on the robbery and assault counts, *State* v. *Toney*, 537 S.W.2d 586 (Mo. App. 1976), and Davis, who shot Kelly, received 52 years from his jury on the same counts.

Since no other court made a finding that Johnson was not prejudiced by the unusual security, the Eighth Circuit's opinion must be read as holding *as a matter of law* "that no prejudice resulted from the security measures imposed by the state trial court." Counsel has been unable to find a single reported case wherein a jury was accompanied by marked police vehicles, or otherwise guarded by armed, uniformed policemen. These jurors could only believe that the judge had knowledge that their lives were in danger. The racial aspects of the crime and the trial, and the brutality of the murders committed by Hill and Jones, rendered even the slightest additional prejudice fatal to the fairness thereof. If *this* degree of unusual, highly visible security in *this* trial was, *as a matter of law*, "not prejudicial," no defendant will ever be found to have been prejudiced by any amount of trial security, because the only way he could demonstrate that the jurors were in fact led to believe that the

judge considered him "dangerous" would be through the testimony of the jurors themselves, and this could not occur because of the rule against permitting jurors to impeach their own verdict. *Kennedy* v. *Cardwell, supra* at 107 n.12. Thus, this decision conflicts with those in other circuits which have found unusual or highly visible security inherently prejudicial.

In holding that, as a matter of law, a daily convoy of three police vehicles between the courthouse and the jurors had no tendency to convince the jurors that Johnson was a member of a highly dangerous black militant organization, the judges of the Eighth Circuit, as judges, have forgotten that which, as trial lawyers, they would have known to a certainty.[13]

IV

Petitioner's Right To Due Process Was Violated Because The State Concealed From Him The Identity Of Witnesses To The Crimes With Which He Was Charged, The Descriptions Which Witnesses Gave To The Police, The Names Of Witnesses Who Viewed The Lineup, And The Notations By Police Of Identifications By Witnesses Viewing Lineups.

There were sixty eyewitnesses to the holdup. A 37; Exh. 2 442-43. The prosecutor endorsed the names of twenty-five of these as potential witnesses. The state has refused to disclose the names of any other eyewitnesses. It has concealed from Johnson: The descriptions given to the police; the names of witnesses who viewed the lineups; and the names of witnesses who identified persons in the lineup, whom they identified, and what they said to the police about the identification.

In one of its most historic decisions, this Court said:

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[13] *Cf. Sherrer* v. *Sherrer,* 334 U.S. 343, 366 (1948)(Frankfurter, J., dissenting); *People ex rel. Alpha Portland Cement Co.* v. *Knapp,* 230 N.Y. 48, 63, 129 N.E. 202, 208 (1920)(Cardozo, J.).

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or special presentation of the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

United States v. *Nixon,* 418 U.S. 683, 708-09 (1974).

> The right to the production of all evidence at a criminal trial . . . has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate these guarantees and to accomplish that it is essential that all relevant and admissible evidence by produced.

418 U.S. at 711.

> [T]he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guaranty of due process of law and gravely impair the basic function of the courts. . . . [T]he constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated.

418 U.S. at 712.

Petitioner filed motions for the police reports and statements of witnesses, which were denied. Exh. 1 22-25, 30-38; Exh.3 939. This was no mere fishing expedition, or attempt to have the plaintiff perform Johnson's investigation for him. Petitioner deposed all of the substantive witnesses endorsed by the state. Yet, a substantial amount of evidence remains hidden.[16]

At the scene, witnesses were interviewed by at least eight officers. Exh. 2 592-94, 600-02, 603, 624; Exh. 3 750, 758-59, 866; Exh. 6 51. Not a single officer was able to recall the name of even one witness whom he interviewed, or anything any witness had said. They all took notes, but the state has concealed these notes. Less than half of the sixty customers in the tavern were endorsed, but petitioner has never been permitted to discover the name of even one other customer. Exh. 2 443, 540. Johnson's knowledge of the descriptions given at the scene is limited to what those witnesses who were endorsed recalled when they were deposed months later. Nor has Johnson ever

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[16] Moreover, there were numerous questions, the answers to which are to be found in the police reports, which remain mysteries. The robbers fled after they saw a police car drive by. They were gone when the car returned 1½-3 minutes later. During that time, a red Buick disappeared from the parking lot. The police know who owned that car, but petitioner has never been able to find this out. Exh. 2 522, 532-34. Who told the police that they had seen "two Negro males running across" a nearby field, and what officer took this report? Exh. 2 544-46, 550-51. Who was sitting at the bar next to the police officer who was murdered? Exh. 2 463, 467-68. Why was Alfred rearrested after the Maplewood lineup? Exh. 3 871, 873. What officers showed photographs of Alfred to "[a]ll the witnesses," when was this done, and what were the results? Exh. 3 873. Lowery testified that he received "a report regarding laboratory investigation or identification" of blood on "arrested persons" clothes being compared . . . with that of someone at the scene of Cousin Hugo's." Exh. 3 857-58. What subject's clothes was he talking about, whose blood, who ran the tests, and why was none of this placed in evidence? Who vacuumed a car belonging to Toney's girl friend, who processed the results, and what, if anything, was learned from this? Exh. 3 855, 1011. Who processed Hill's car for fingerprints and what were the results? Exh. 2 723-24, 861-62.

been able to learn who, other than endorsed witnesses, viewed the lineups. Boulch could not remember any of the witnesses, or whom they identified. Exh. 2 709. None of the witnesses who were endorsed remembered what numbers they whispered.

The Eighth Circuit's response to this was simply that the state trial judge " 'ordered the prosecution to disclose all evidence which might reasonably be considered favorable to the defendant * * * and accepted the prosecution's representation that it had complied with the order,' " and that this was " '[a]ll that the Constitution requires.' " A 48. In other words, the court held that the only "disclosure" which Johnson was entitled to receive was the opinion of the prosecutor that none of the names of the eyewitnesses, nor any of their descriptions to the police, nor any of their lineup identifications, could " 'reasonably be considered favorable' " to him, and that the accuracy of that opinion need not ever be subject to post-trial scrutiny by any court. This holding cannot be reconciled with the language of this Court's unanimous opinion in *United States* v. *Nixon*.

There was no reason to conceal this evidence at the time of trial, and there is no reason to hide it now. Petitioner prays this Court to order remand of this case to the district court for production of the witnesses' statements and the police reports. Only then can it be determined whether suppression of this information deprived petitioner of a fair trial. Justice will be served by doing so, and it certainly cannot be harmed thereby.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-1507 C(1)

Theodore Roosevelt Johnson, Jr.,
Petitioner,

v.

Donald Wyrick, Warden, Missouri State Penitentiary,
Respondent.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

The petition of Theodore Roosevelt Johnson for a writ of habeas corpus under 28 U.S.C. §2254 was referred to the undersigned United States Magistrate for initial review and a recommended disposition. 28 U.S.C. §636(b).

Petitioner, a Missouri state prisoner, was convicted in 1973 by a jury in the Circuit Court of St. Louis County, Missouri of two counts of first degree murder, two counts of assault with intent to kill with malice, and two counts of robbery first degree by means of a dangerous and deadly weapon. He was sentenced to two concurrent terms of life imprisonment and four concurrent terms of ninety-nine years' imprisonment to run consecutively to the life terms.

The conviction was affirmed by the Missouri Court of Appeals, St. Louis District. *State of Missouri* v. *Johnson,* 539 S.W.2d 493 (Mo. App. 1976). His motion for rehearing or transfer to the Missouri Supreme Court was denied by the Court of Appeals and his application to the Missouri Supreme Court

for transfer was denied. Petitioner thereafter sought post-conviction relief under Missouri Supreme Court Rule 27.26 which was dismissed without a hearing. The dismissal was affirmed. *Johnson* v. *State of Missouri,* 574 S.W.2d 957 (Mo. App. 1978).

Petitioner now claims that his present incarceration in the Missouri State Penitentiary is unconstitutional. He alleges ten separate violations of his constitutional rights which occurred at his state trial. The claims are treated seriatim below.

BACKGROUND

The state's evidence tended to show that at approximately 1:30 a.m. on March 18, 1972 the petitioner and three or four other black male companions entered Cousin Hugo's tavern in St. Louis County, Missouri armed with shotguns and knives.[1] The tavern was crowded with St. Patrick's Day celebrants. At least two of petitioner's companions went to the back room of the bar and commanded the patrons to lie on the floor and to throw their valuables to the center of the room. The property was gathered into a bag by one of the robbers. Another robber jumped the bar in the front room of the tavern and ordered the bartender to open the cash register, which she did. At some point one of the two bartenders was stabbed. The patrons in the front room were also told to lie on the floor and a few of them were frisked. A patron in the hallway leading to the restrooms was fatally stabbed. One of the robbers noticed a police car drive by the tavern and warned his companions. As the robbers fled, shots were fired. One patron was injured and another, an off-duty police officer, was killed.

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[1] This statement of the occurrences inside the tavern is a compilation of the testimony of the tavern owner (Resp.Exh. A-2, 442-460), the thirteen testifying patrons (Id., 461-517; Resp.Exh. A-3, 895-909, 946-988), and the testimony of the tavern's employees (Resp.Exh. A-3, 909-946).

An investigation was immediately begun by the Major Case Squad, a combination of officers from the City of St. Louis, St. Louis County, and surrounding counties. (Resp.Exh. A-3, 841). Shotgun shells and a shotgun forestock were seized from the tavern. (Resp.Exh. A-2, 594, 617). Persons who lived near the tavern were questioned as to whether they had noticed anything unusual. One resident, Mark Casey, who lived just down the street from the tavern was contacted by the police at approximately 6:00 a.m. on March 18, 1972. (Resp.Exh. A-2, 653). he initially informed the police that he had not noticed anything unusual but remembered after the police had left that at around 5:00 p.m. on March 17 he had seen a car containing four or five black males driving down his dead-end street. (*Id.*, 650-656). He had recognized two of the men as former classmates of his, Lucius Toney and Louis Jones. (*Id.*) He then walked to the tavern and informed the police of the incident. (*Id.*) He also provided the police with an address for Toney. (*Id.*)

Sergeant Thomas Boulch and another officer investigated the address provided by Casey. (*Id.*, 672-673) A woman answered the door at the address and became upset when she was shown the officer's badge. (*Id.*) She came out of the house and proceeded to a neighboring address on Banneker Street crying "Lucius, the police". (*Id.*) A black man standing in front of the house identified himself to the officers as Lucius Toney and consented to having the officers look through the house. (*Id.*, 675-678) Sergeant Boulch entered the house. Toney ran past him into the bedroom. (*Id.*) Boulch followed Toney, noticed the door closing to the bathroom, and entered the bedroom with his revolver drawn. (*Id.*) He yelled to his partner that someone was in the bathroom and arrested Toney, Christopher Davis and the petitioner in the bedroom. (*Id.*, 682) Louis Jones was arrested in the bathroom. (*Id.*, 682) While in the bedroom Boulch had noticed a pistol in an open drawer (*id.*, 681), and the stock of a shotgun on the floor. (*Id.*, 676)

Having handcuffed the four men, the officer returned to the bedroom and bathroom to search for more subjects. (*Id.*, 688, 691) He noticed a gun barrel protruding from underneath a hat on the floor and removed the hat, revealing a pistol. (*Id.*, 689) He than proceeded to the bathroom, where he inspected a pile of clothes approximately three feet high. (*Id.*, 692-93). He moved the clothes around in order to insure that no one was beneath the pile and noticed an open bag containing wallets and purses. (*Id.*, 689.) This evidence, along with other evidence including guns, ammunition, and a knife, were seized. (*Id.*, 692-698.) Money in excess of $600.00 was also seized from the dresser. (*Id.*, 699.) Before the investigaton at the house was completed, the officers were ordered to leave because a large crowd had begun to gather. (*Id.*, 700) During the investigation, a man by the name of Robert Alfred who had approached the house was taken into custody (Resp.Exh. A-3, 754.) This arrest was apparently the result of information provided by a confidential informant. (*Id.*, 859.) Alfred was eventually released. (*Id.*, 713, 872.)

Petitioner, Toney, Jones, Davis and Alfred were taken to the police station, advised of their rights (*id.*, 754), and booked. (*Id.*, 735-36.) $196.00 was found on petitioner. (*Id.*, 735.) Another suspect, James Roy Hill, was subsequently arrested and booked in the City of St. Louis. (*Id.*, 802-803.) The circumstances leading to his arrest do not appear from the record.

The house on Banneker Street was searched again on Sunday, March 18, with the consent of Toney's sister (*id.*, 847), who lived at the house with Toney (*id.*, 838), and Louis Jones (*id.*, 839). Three sawed-off shotguns were seized from behind the bathroom wall. (*Id.*, 848.) Petitioner was not a resident of the house on Banneker Street. (*Id.*, 839-840.)

At trial the state's expert testimony showed that: (1) the shotgun shells found at the tavern were fired from weapons found at the Banneker address (*id.*, 992-998); (2) fingerprints

matching the fingerprints of Hill, Davis and petitioner were found on various items of the property contained in the bag (*id.*, 811-816; 832); and (3) neutron activation analysis performed on residue taken from the hands of Toney, Jones, Davis, Alfred and petitioner indicated that all five suspects had handled and discharged firearms within hours of their arrest (*id.*, 1060).

Testimony by three witnesses identified petitioner as one of the robbers. (*Id.*, 900-901; 913; 927.) Two of the bartenders testified that petitioner had come into the tavern late in the afternoon of Friday, March 17, and remained in the tavern approximately five minutes. (*Id.*, 928, 941-942.) Three other witnesses testified to seeing Toney and Jones accompanied by one to three other black males in the area of the tavern that afternoon. (Resp.Exh. A-2, 629-639; 636-646; 649-656.) One of the patrons identified a knife seized from the residence at Banneker as the knife used to stab the bartender. (*Id.*, 472-73, 697.) Several patrons identified property found in the bag at the Banneker address as belonging to them. (Resp.Exh. A-3, 779, 795-797, 959-60, 979, 985, 1070, 1078.) Toney, Davis, Jones, and Hill were identified as among the robbers by various patrons and employees.

Petitioner's theory of defense at the state trial was that there were only four robbers and that petitioner was not among them. (Resp.Exh. A-4, 1104, 1195-1232.) Testimony was presented which tended to impeach the state's identification evidence. (*Id.*, 1100-1102, 1120-1121, 1125-1134.)

Petitioner's attorney requested a two-day continuance to produce an expert on neutron activation analysis whom he claimed would rebut the state's expert testimony on this point. (*Id.*, 1148-1151.) The request was denied. (*Id.*) The jury returned a verdict of guilty for each of the two counts of first degree murder, the two counts of assault with intent to kill with malice and the two counts of armed robbery. (*Id.*, 1251-1252.)

Petitioner raises ten grounds for federal habeas corpus relief.

GROUNDS 1 & 2: DENIAL OF CONTINUANCES

Petitioner argues that his right to due process of law under the Fifth and Fourteenth Amendments was violated by the trial court's refusal to grant him continuances to obtain the testimony of two witnesses. On the denial of continuances the Supreme Court has stated in *Ungar* v. *Sarafite,* 376 U.S. 575, *at* 589 (1964):

> The matter of continuances is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. (Citations omitted.)

Petitioner first requested a continuance before trial to obtain the testimony of Nathaniel Heard, whom petitioner claimed would testify that James Hill was one of the robbers and that Hill admitted to shooting the officer. Petitioner argues that the testimony of Heard that Hill was among the robbers was essential to his theory of defense that there were only four robbers, Toney, Davis, Hill and Jones. Petitioner hoped to prove by Heard that Hill was the person who killed the policeman while standing at the tavern door, not petitioner, and that, therefore, petitioner was not one of the robbers. (Resp.Exh. A-1, 40-45). Petitioner also claimed that Heard would become available within six months because Heard had been endorsed as a state's witness in the trial of James Roy Hill for the same offense. (*Id.*) Petitioner stated he had used due deligence in attempting unsuccessfully to secure Heard's testimony. (*Id.*)

It was not unreasonable to deny the motion. The trial had been continued twice at petitioner's request. (*Id.*, 37; Resp.Exh. A-6, 128-129.) There was no real indication that Heard would be able to be found in six months. The fact that the state had endorsed Heard as a witness in another trial indicated only that the state might attempt to locate him. It was not unreasonable for the trial judge to conclude that the mere possibility that the state migt succeed in locating Heard sometime in the future was insufficient to outweigh the state's interset in proceeding to trial. There remained almost one week before the trial was scheduled for the defense to locate Heard. (See transcript of in-chambers hearing on motion for continuance, Resp.Exh. A-6, 134-154, especially 152.) Also, the petitioner's interest in securing Heard's testimony that Hill was one of the robbers was not critical. In the words of the Missouri Court of Appeals:

> The prosecution's evidence established that five persons participated in the offense. Proving that Davis, Hill, Toney, and Jones were there would not establish that Johnson was not. Defendant was not prejudiced by the court's refusal to grant a continuance.

539 S.W.2d *at* 506. To put the statement in constitutional terms, petitioner was not deprived of his right to present his defense by the court's denial of his request for a continuance. This ground for relief is without merit.

The second continuance was denied during trial. The trial judge refused to grant a two-day continuance so that petitioner could obtain the testimony of Dr. Guinn, an expert on neutron activation analysis. Petitioner claimed that Dr. Guinn would rebut the testimony of the state's expert that neutron activation analysis had shown that petitioner had handled and fired a firearm within a few hours of his arrest. (Resp.Exh. A-4, 1148-1151.) Petitioner was arrested six to eight hours after the robbery. (Resp.Exh. A-3, 707; A-4, 845, 881).

The denial of this continuance was not constitutional error. It was not necessary for the jury to find that petitioner had discharged a firearm to find him guilty of the crimes charged. *State of Missouri* v. *Johnson, supra, at* 506. In the two federal habeas corpus cases cited by petitioner the denial of a motion for continuance was, in the circumstances of those cases, held to be an effective denial of the petitioner's right to present his only defense. *Singleton* v. *Lefkowitz,* 583 F.2d 618, 625 (2nd Cir. 1978), *cert. denied,* 440 U.S. 929 (1979); *Johnson* v. *Johnson,* 375 F.Supp. 872, 874 (W.D.Mich. 1974). This is not the case here. Even if impeachment of the state's evidence that petitioner had fired a gun is considered a defense, petitioner was not totally denied an opportunity to put that impeaching evidence before the jury. The state's expert was extensively questioned concerning the contrary published opinions of Dr. Guinn (Resp.Exh. A-3, 1051-1058.) The trial judge's refusal to grant the continuance was apparently based on the prosecution's argument that under the circumstances, Dr. Guinn's testimony would add very little to the evidence already before the jury. (Resp.Exh. A-4, 1151.) It cannot be said that the denial was so arbitrary as to amount to a denial of due process or was unduly prejudicial. Petitioner's claim for habeas relief on this ground is without merit. *Fields* v. *Strickland,* 444 F.Supp. 795 (D.S.Car. 1977).

GROUND NO. 3: DENIAL OF VOLUNTARINESS HEARING

Petitioner's third claim for habeas relief is that his right to due process of law was violated when the trial court denied his request for a hearing on the "admissibility" of testimony by a police officer that petitioner had said to the officer "they can't get me for that; I was in the workhouse when that pig was killed." Petitioner claims that under *Jackson* v. *Denno,* 378 U.S. 368 (1964), he was entitled to a hearing on the voluntariness of the statement outside the presence of the jury.

The record shows that during the direct examination of Officer Bokal, the following occurred:

Q Where were you taking him [petitioner] from and to?

A From the inside of the County police building to the parking lot where there was a paddy wagon.

MR. KIMBRELL [defense counsel]: May we approach the bench? [out of jury's hearing] Judge, Mr. Merz is apparently heading toward a statement allegedly made by defendant at the time. He previously indicated to me he had not decided whether or not to go into this matter. Since he apparently is, I would ask here out of the presence of the jury a ruling on the relevancy and admissibility of this statement.

MR. MERZ: Judge, the evidence will show that the officer overheard defendant say, not in response to any question, that "They can't get me for this; I was in the workhouse when the pig was killed", or words to that effect. That's really all there is to it.

THE COURT: In other words, its exculpatory in nature rather than incriminating?

MR. MERZ: That's correct.

THE COURT: All right.

Thereupon, further discussion was had off the record.

THE COURT: The request will be denied. You may proceed.

(Resp.Exh. A-3, 884-85). The officer was allowed to testify to having overheard the remark. (*Id.*, 885-886.) At the close of the state's case, the parties stipulated that workhouse records show that no one named Theodore Roosevelt Johnson or Theodore Johnson was incarcerated there at the time of the killings. (Resp.Exh. A-4, 1091-1092.)

Respondent argues that petitioner may not raise this claim now, because his counsel failed to object to this evidence on the

grounds raised here and failed to include this ground in his motion for a new trial, as required by Missouri Supreme Court Rule 27.20. Petitioner's trial defense counsel has filed an affidavit with this Court stating that the failure to raise this claim in the motion for a new trial was inadvertant and that petitioner was not consulted before the motion was filed. (Kimbrell affidavit, filed June 25, 1980, 1.)

On appeal from the conviction the Missouri Court of Appeals did not consider petitioner's claim on its merits, holding that he had never presented the claim to the trial court and had failed to preserve the issue for review in his motion for new trial. *State of Missouri* v. *Johnson, supra, at* 507. The issue was not raised by petitioner in his motion for post-conviction relief under Rule 27.26. Respondent therefore argues that petitioner has failed to exhaust his state remedies as required by 28 U.S.C. §2254(b) and (c). It is respondent's contention that Rule 27.26 remains available to petitioner.

The availability of Rule 27.26 is not as clear as respondent suggests. The rule itself provides that:

> The sentencing court shall not entertain a second or successive motion for relief on behalf of the prisoner where the ground presented in the subsequent application was raised and determined adversely to the applicant on the prior application or where the ground presented is new but could have been raised in the prior motion pursuant to subsection (c) of this Rule.

Mo.S.Ct. Rule 27.26(d). Subsection (c) provides that "[t]he motion shall include every ground known to the prisoner for vacating, setting aside, or correcting the conviction and sentence." It is therefore likely that under these provisions, petitioner's second motion for 27.26 relief would be dismissed by the state sentencing court. In light of the difficulties petitoner would face were he to file a second 27.26 motion, the exhaustion requirement of 28 U.S.C. 2254(b) and (c) should not

be inflexibly applied to bar the petitioner's federal habeas corpus claim. *Parton* v. *Wyrick*, 614 F.2d 154, 157 (8th Cir. 1980).

There is, however, another step before the merits of petitoner's claim can be reached. In *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), the United States Supreme Court held that a statute court's ruling that the defendant waived his federal constitutional claim as a matter of state procedural law bars federal habeas corpus review absent a showing of cause for the noncompliance and actual prejudice resulting from the alleged constitutional violation. *Rinehart* v. *Brewer*, 561 F.2d 126, 130 n.6 (8th Cir. 1977).[2]

Petitioner's "cause" for the failure to include the claim in his motion for new trial is inadvertence by trial counsel.[3] Counsel's affidavit states that the omission was due to inadvertence and that petitioner was not consulted as to the motion's contents (Kimbrell affidavit, *supra*.) The United States Supreme Court has intentionally refrained from defining sufficient "cause" for these purposes. *Wainwright, supra, at* 91.

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[2] The decisions of the Court of Appeals for the Eighth Circuit have not delineated the procedural defaults that are to be analyzed under *Wainwright, supra,* as against procedural defaults analyzed under the *Fay* v. *Noia*, 732 U.S. 391 (1963), "deliberate by-pass" standard. *See Rodgers* v. *Wyrick*, 621 F.2d 921, 927 n.13 (8th Cir. 1980). The *Wainwright* "cause and prejudice" standard is applied here because the procedural defaults involved, *i.e.* failure to make a clear objection and failure to include the claim in the motion for new trial, are trial decisions generally made by trial counsel and do not implicate "the exercise of volition by the defendant himself with respect to his own federal constitutional rights." *Wainwright, supra, at* 92 (Berger, C.J. concurring). *Rinehart* v. *Brewer*, 561 F.2d 126, 130 n.6 (8th Cir. 1977).

[3] Petitioner argues that *Wainwright* does not apply to his counsel's failure to explicitly request a *Stovall* v. *Denno, supra,* hearing during the officer's testimony because the trial judge was made aware of the

The question of whether attorney error, as opposed to a tactical decision by an attorney, is sufficient "cause" under the *Wainwright* standard for failure to follow a state's procedural rules has not been settled by the federal courts of appeal and district courts. *See e.g. Rinehart* v. *Brewer, supra, at* 130 n.6. This issue need not be decided for two reasons. First, petitioner has failed to allege in what respects the admission of the statement resulted in actual prejudice. And second, as in *Wainwright,* which also involved a failure to object to the admission of statements made by the habeas petitioner to the police, "[t]he other evidence of guilt presented at trial. . . was substantial to a degree that would negate any possibility of actual prejudice. . . ." *Wainwright* v. *Sykes, supra, at* 91. Therefore, this ground for relief is without merit.

GROUND NO. 4: IDENTIFICATION TESTIMONY

Petitioner's fourth claim is that his right to due process of law was violated by the admission of in-court identification testimony. It is his claim that the in-court identifications of witnesses Miller, Kelly, Sullivan and Clemens were the products of the witnesses' repeated exposure to photographs of petitioner shown to them by the police or the prosecution and published in the newspaper and were the products of suggestive lineup procedures employed by the police.

The relevant facts are these: The four witnesses were present at the tavern at the time of the crime. On the day of petitioner's arrest (March 18, 1972) and approximately eleven hours after the robbery, petitioner was placed in a lineup with seven other persons (including three other suspects: Toney, Davis and

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claim. *Collins* v. *Auger,* 577 F.2d 1107 (8th Cir. 1978), *cert. denied,* 439 U.S. 1133 (1979). It is the conclusion of the undersigned that a request for a hearing outside the presence of the jury on the "relevancy and admissibility" of the statement was not the substantial equivalent of a request for a voluntariness hearing. *Picard* v. *Connor,* 404 U.S. 270, 276 (1971).

Jones) at the Maplewood, Missouri police station. (Resp. Exh. A-2, 434.) This lineup was viewed by witness Laura Miller. (Resp.Exh. A-3, 927). At some time on the same day, petitioner was photographed by newspaper reporters and his photograph along with that of the other suspects appeared in the *St. Louis Post Dispatch* and the *St. Louis Globe Democrat* on March 19, 21 and 22. (Resp.Exh. A-6, 6-10, 33-35.) On March 21, three days following the crime, witness Joyce Sullivan viewed a second lineup at St. Louis County police headquarters. (*Id.*, 18-20; Resp.Exh. A-3, 912-913.) A photograph and videotape of this lineup was shown to witness Kelly while he was in the hospital, sometime between five to nine days after the robbery. (Resp.Exh. A-6, 37-39; A-3, 900-901.) Sandra Clemens was also shown a videotape of this lineup. (Resp.Exh. A-3, 943.)

Sullivan, Kelly and Clemens all testified that they had seen newspaper photographs of petitioner, but none were able to recall whether they saw them before or after they viewed the lineup. (Resp.Exh. A-6, 14-18, 40-42; A-3, 902-903.) Laura Miller made her identification before the newspaper photograph were published.

Sullivan testified that she had been shown photographs which included the petitioner twice since she viewed the lineup. (*Id.*, 935.) Kelly testified that he had viewed photographs at least twice since he had viewed the videotape, one of those times being immediately before he had entered the courtroom. (*Id.*, 903-904.) Clemens' testimony did not indicate whether she had been shown photographs by the prosecutor. (*Id.*, 939-946.)

Identification testimony by one who has actually observed a crime is generally admissible and it is left to the trier of fact to determine whether the testimony is worthy of credence. *Sanchell* v. *Parratt*, 530 F.2d 286, 292 (8th Cir. 1976). The Fourteenth Amendment's due process clause, however, requires suppression of the evidence where the procedures employed by the police were unnecessarily suggestive and conducive to ir-

reparable mistaken identification. *Stovall* v. *Denno,* 388 U.S. 293, 301-302 (1967); *Neil* v. *Biggers,* 409 U.S. 188 (1972); *Manson* v. *Braithwaite,* 432 U.S. 98 (1977).

Petitioner alleges that the lineup procedures employed by the police, and the photographs of those lineups, were unnecesarily suggestive because the lineups consisted solely of suspects and police officers. Petitioner fails to allege in what respects the presence of the other suspects and the police officers caused undue suggestiveness. There were nine or ten negro males in both lineups, (Resp.Exh. A-6, 17, 53, 89) and there is no testimony that the police officers behaved in any peculiar way or were otherwise identifiable as officers. There is no evidence to support petitioner's allegation of suggestiveness as to the lineups.

It is also claimed by petitioner that the lineups and photographs of the lineups were suggestive because the police permitted the newspapers to take and publish photographs of the suspects before the witnesses had viewed the lineup. Petitioner has pointed to no authority, and the undersigned is aware of none, which prohibits the police from permitting the publication of a suspect's photograph. The possibility that the identifying witnesses viewed the newspaper photographs before viewing the lineup does not render the police procedures suggestive. Although that possibility may effect the reliability of the identifications, *Stovall, supra; Biggers, supra;* and *Manson, supra,* require only that identification testimony which is unreliable as the result of suggestive police procedures be excluded. If identification testimony is unreliable for some other reason unrelated to police activity, it is left to the jury to determine whether the testimony is worthy of credence.

The final allegation made by petitioner raises a serious issue of unnecessarily suggestive police-prosecutorial procedures. The repeated viewing of petitioner's photograph by the witnesses creates the possibility that their in-court identification of petitioner was based on the photographs rather than their view of

the robber at the time of the crime. There was testimony that witnesses Kelly (Resp.Exh. A-3, 903-904), Miller (*Id.*, 935), and Sullivan (*Id.*, 919) had been shown photographs of the petitioner prior to the in-court identification. Witness Clemens' testimony does not indicate that she was shown photographs, and her identification, although of questionable reliability, was therefore not "tainted" by suggestive police procedures and is constitutionally admissible.

Assuming this procedure was unnecessarily suggestive, the in-court identifications of petitioner were nontheless constitutionally admissible if the witnesses' basis for identification was independent of the tainted procedure and reliable.

> [R]eliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-Stovall confrontations. The factors to be considered are set out in *[Neil v.] Biggers,* 409 U.S. *at* 199-200. These include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.

Manson, supra, at 114.

All three of the witnesses had a sufficient opportunity to view the criminal at the time of the crime and a sufficient degree of attention. Although witness Kelly testified that he had only a two or three second look at the man he identified as petitioner (Resp.Exh. A-3, 906; A-6, 47), he testified that the man was four to six feet away from him (Resp.Exh. A-3, 898; A-6, 47) and that he tried to concentrate on facial features (Resp.Exh. A-3, 908). Witness Sullivan, who was sitting at Owen Kelly's table, viewed the man she identified as petitioner as he walked past her table (*Id.*, 910). Her attention was apparently focused on the man and his companion because she testified that she knew something was wrong because she had never seen blacks in

the tavern before. (*Id.*) Witness Miller testified that the man she identified as the petitioner had come into the tavern earlier in the afternoon for approximately five minutes (*id.*, 928) and the robber who had stood almost directly in front of her under a bar light for three to four minutes (*id.*, 924-928).

The degree of the witnesses' certainty in their identification is another factor to be considered. Witnesses Kelly (*id.*, 902, 905-906, 908), Sullivan (*id.*, 921; Resp.Exh. A-6, 26-28), and Miller (Resp. Exh. A-6, 89) all exhibited a strong degree of certainty in their identifications.

Also to be considered is the time lapse between the crime and the confrontation. Witness Kelly viewed a photograph and a videotape of a lineup sometime between five and nine days following the crime. (*Id.*, 27, Resp.Exh. A-3, 900.) A lineup was viewed by witness Sullivan in St. Louis County four days after the crime (Resp.Exh. A-6, 17). Witness Miller viewed a lineup in Maplewood the day following. (*Id.*, 51.)

Based on the above, it is the undersigned's opinion that in the "totality of the circumstances" the reliability of the in-court identifications by witnesses Kelly, Sullivan and Miller outweighs any possible suggestiveness caused by their viewing of petitioner's photograph prior to trial, and petitioner's right to due process was therefore not violated by the admission of these in-court identifications. *Manson, supra, at* 114.

GROUNDS NO. 5 AND 6: DISCLOSURE OF INFORMANT'S IDENTITY

Petitioner's fifth and sixth grounds for habeas relief allege deprivations of his right to due process of law under the Fifth and Fourteenth Amendments resulting from the state trial court's refusal to order disclosure of the identity of two informants and disclosure of the identity of the police officer who received information from one of the informants. Petitioner also argues that his right to due process of law was further

violated by the trial court's failure to hold a hearing outside of the presence of the jury to determine the nature of the informants' information and its usefulness to petitioner's defense and to balance that need against the state's interest in maintaining the informant's confidentiality.

As to petitioner's argument that his right to due process of law was violated by the trial court's failure to hold an *in camera* hearing, petitioner has failed to point to any constitutional authority which requires such a hearing. There is nothing in the record which indicates that petitioner ever requested such a hearing (Resp. Exh. A-3, 859-861, 865). The circumstances are analagous to those in *United States* v. *Alexander,* 559 F.2d 1339, 1344 (5th Cir. 1977), *cert. denied, sub. nom., Pierce* v. *United States,* 434 U.S. 1078 (1978), where the court held:

> Appellants further contend that the district court should have held an *in camera* interview with the informant. A district court in exercising its discretion in determining whether to compel disclosure of the identity of an informant must balance the needs demonstrated by the defendants with the governmental interest in maintaining the secrecy of the informant's identity. *Roviaro* v. *United States,* 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). An *in camera* hearing may be helpful in balancing these interests, *United States* v. *Doe,* 525 F.2d 878 (5th Cir. 1976), *cert. denied,* 425 U.S. 976, 96 S.Ct. 2179, 48 L.Ed.2d 801, but we refuse to adopt a rule requiring a district court to hold an *in camera* hearing whenever the identity of an informant is requested. The defendants failed to request an *in camera* hearing and the district court was not required to *sua sponte* order such a hearing.

The law in Missouri is the same. Petitioner presented this argument to the Missouri Court of Appeals on direct appeal, which held "[t]he trial court may, without a hearing and in the exercise of its discretion, determine whether defendant can have a fair

trial without requiring the officer to disclose the name of his informant, when it is possessed of sufficient information as it was here." *State of Missouri* v. *Johnson, supra, at* 511.

Assuming that a *Roviaro, supra,* balancing is required by the Constitution and therefore cognizable under 28 U.S.C. §2254, the facts before the court were sufficient to permit such a balancing and to support the denial of petitioner's request for disclosure. Petitioner attempted on cross-examination to discover the identity of the informant who provided information leading to the arrest of Robert Alfred[4] (Resp.Exh. A-3, 859-861) and of the informant who supplied information that a certain automobile had been used in the crime. (*Id.*, 864-865.) Neither Alfred nor the automobile were ever connected with the crime. Petitioner argues that the nature of the information provided by the informants indicates that they were either eyewitnesses to the crime or participants and could therefore support petitioner's theory that he was not involved in the crime. Such a conclusion is mere speculation. The trial judge's refusal to permit the petitioner to obtain the identity of the informants was not such an abuse of discretion as to deny petitioner the "fundamental requirement of fairness." *Roviaro, supra, at* 60-61. These claims for relief are without merit.

GROUND NO. 7: COMPOSITION OF GRAND JURY WHEEL

Petitioner's seventh ground for relief is that his right to equal protection of the laws under the Fourteenth Amendment was violated by the under-representation of certain identifiable classes of persons in the grand jury wheel from which the grand

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[4] It is assumed that the trial court's refusal to permit the petitioner to obtain the name of the police officer who received the information concerning Alfred from the informant, if cognizable at all under 28 U.S.C. §2254, should be treated under the same standard as disclosure of the informant. This issue is therefore given no separate treatment.

jurors who indicted him were chosen. It is petitioner's claim that the "wheel" did not contain a cross-section of the community because persons under the age of thirty, persons earning less than $10,000 per year, and blue collar workers were under-represented. Respondent argues that petitioner's failure to raise this particular challenge to the grand jury at trial and on direct appeal precludes §2254 consideration.

This particular claim was asserted for the first time in his post-conviction collateral attack under Rule 27.26, which was dismissed without a hearing. On the appeal from the summary dismissal, the Missouri Court of Appeals held as to petitioner's age and income level claim:

> By his first ground defendant challenges the qualifications of the grand jurors who indicted him. Defendant could have raised this issue on direct appeal but he did not. We hold this was a "deliberate bypass" and cannot be raised on a Rule 27.26 motion. *See Francis* v. *Henderson,* 425 U.S. 536 (1976); and compare *McCrary* v. *State,* 529 S.W.2d 467 [7, 8] (Mo. App. 1975).

Johnson v. *State of Missouri, supra, at* 958. Respondent also asserts that petitioner has waived this claim by failing to raise it by pretrial motion as required by Mo.S.Ct. Rule 25.06(b).

Petitioner argues that : (1) his pretrial objection to the *racial* composition of the grand jury wheel was an adequate presentation of the claim to the state courts; (2) because Missouri does not recognize the federal cases holding that under-representation of these classes may violate equal protection and does not allow defendant's access to the demographic information necessary to prove such a claim, *Garret* v. *Saitz,* 594 S.W.2d 606 (Mo. en banc. 1980), presentation of the claim to the Missouri courts would have been futile and petitioner cannot be held to have waived his claim; (3) there was no "deliberate bypass" since neither petitioner nor his attorney were aware of the possibility of a claim based on the under-

representation of these classes (Kimbrell affidavit, 1); and (4) there was "cause" for petitioner's failure to raise the claim and resulting "prejudice."

It is the undersigned's opinion that petitioner never adequately raised the issue of under-presentation of certain age and income classes to the Missouri courts. The objection as regards the racial composition of the jury, although made on equal protection grounds, was insufficient to put the state trial court on notice of an equal protection claim based on age and wealth classifications. This is not a case where the petitioner simply failed to cite chapter and verse of the Constitution. The petitioner here failed to make the underlying factual allegations necessary to his claim. Petitioner's argument that the state court was adequately apprised of the claim is therefore without merit.

Petitioner has, however, exhausted his available state court remedies. "The question with respect to exhaustion is not merely whether . . . [the petitioner] . . . has in the past presented his claim to the state courts, but also whether there is, under the law of Missouri, any presently available state procedure for the determination of the merits of that claim." *Thomas* v. *Wyrick*, 622 F.2d 411, 413 (8th Cir. 1980). As noted earlier, petitioner's attempt to raise this claim in a Rule 27.26 proceeding was dismissed on a finding of "deliberate bypass." *Johnson* v. *State of Missouri, supra.* Petitioner has therefore exhausted his available state court remedies. *Thomas* v. *Wyrick, supra, at* 414.

It is necessary, however, to determine whether consideration of petitioner's claim on federal habeas corpus is barred by the nature of petitioner's procedural default. The United States Supreme Court has held that a state prisoner who fails to make a timely challenge to the composition of the grand jury that indicted him is barred from federal habeas relief absent a showing of "cause" for the failure and resulting "prejudice". *Francis* v. *Henderson*, 425 U.S. 536 (1975); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

Petitioner argues that because the Missouri Supreme Court has recently rejected the very claim of grand jury underrepresentation that petitioner here asserts, *Garret* v. *Saitz, supra,*[5] the procedural default rules of *Francis* v. *Henderson, supra,* and *Wainwrights* v. *Sykes, supra,* do not apply.

Petitioner relies on *Rummel* v. *Estelle,* 587 F.2d 651 (5th Cir. 1978) which holds that *Sykes, supra,* is not applicable to a failure to comply with a state contemporaneous objection rule when the state has repeatedly and summarily rejected the claim that would have been raised. The rationale for the rule is that the policies of the state's contemporaneous objection rule, which *Sykes* intended to protect, are not served by requiring attorneys to make objections known to be futile. *Pedrero* v. *Wainwright,* 590 F.2d 1383, 1390 n.5 (5th Cir. 1979).

The problem with petitioner's argument is that at the time of his trial it was not clear that an objection to the grand jury based on age and wealth classifications would be futile. *Garrett* v. *Saitz, supra,* was not decided until February of 1980. Petitioner was convicted in February of 1973. This is not a case where a holding that petitioner has waived his federal claim by failure to comply with state procedural rules would force attorneys to make numerous futile objections in order to preserve that claim. The application of *Wainwright, supra,* and *Francis, supra,* to petitioner's case would serve the policy of making the state trial

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[5] Garrett claimed that the following identifiable groups were underrepresented: (1) minority or non-white persons, (2) women, (3) persons of or near his age of eighteen, (4) persons of or near his economic class or income, (5) persons from non-professional occupations, and (6) persons from geographic locations in St. Louis County. The Court ordered that the demographic information requested by Garrett be supplied except the names, addresses and occupations of those on the master list. The latter information was accepted as beyond Garrett's need to support a jury challenge because the only identifiable groups thus far recognized in equal protection jury challenges are blacks, persons of Mexican descent, and women. *Garrett* v. *Saitz, supra, at* 608.

the "main event", rather than a "tryout on the road." *Wainwright, supra, at* 90. As stated by the Supreme Court:

> The waiver provisions of Rule 12(b)(2) are operative only with respect to claims of defects in the institution of criminal proceedings. If its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.

Francis v. *Henderson, supra, at* 540, quoting from *Davis* v. *United States,* 411 U.S. 233, 241 (1972). The Missouri time limitation applicable in this case serves the same purposes. As in *Francis* v. *Henderson, supra,* considerations of comity and federalism require that the federal courts protect these legitimate state interests by denying habeas corpus review to a state prisoner who has failed to preserve his federal claim through non-compliance with a state procedural rule absent a showing of "cause" and "prejudice."

Petitioner's "cause" for not raising the specific grand jury challenge here alleged is that "at the time the motion to quash was filed, neither petitioner nor his counsel was aware that younger adults, lower-income residents, and non-salaried employees were under-represented in the grand jury wheel, nor of the cases holding that such under-presentation violated petitioner's right to equal protection." (Pet.'s Brief, 64.) This claim is supported by an affidavit filed by petitioner's defense at-

torney. (Kimbrell affidavit.) The Court of Appeals for the Eighth Circuit has stated in *dictum* that unawareness of facts or law is sufficient cause for failure to make a proper objection under the *Francis* standard. *Collins* v. *Auger, supra, at* 1110 n.2; *contra, Dumont* v. *Estelle,* 513 F.2d 793, 798 (5th Cir. 1975); *Polizzi* v. *United States,* 550 F.2d 1133 (9th Cir. 1976).

Even assuming that unawareness of a constitutional claim is sufficient "cause", petitioner has failed to allege any "prejudice" resulting from the under-representation of the particular age and economic groups on the jury wheel. There is no presumption of prejudice resulting from alleged improprieties in grand jury selection procedures. *Davis* v. *United States, supra, at* 245. Although the standard for determining sufficient prejudice is unclear, *Collins* v. *Auger, supra, at* 1110, *Francis* v. *Henderson, supra,* requires some showing of both cause *and* prejudice before a state procedural default regarding a grand jury challenge will not be held to bar federal habeas corpus review.

For these reasons this claim should be denied.

GROUND NO 8: SEARCH

Petitioner's eighth ground for relief is that his right to be free from unreasonable search and seizure guaranteed by the Fourth and Fourteenth Amendments was violated by the admission of certain evidence. This evidence was seized from the house on Banneker Street after being discovered by the police during a warrantless search which occurred after petitioner was arrested.

Respondent argues that this Fourth Amendment claim is not reviewable on federal habeas corpus because petitioner was afforded a full and fair pretrial hearing on this issue by the state courts. *Stone* v. *Powell,* 428 U.S. 465 (1976). Petitioner agrees that he was given a full and fair hearing on the issues of the entry into the house by the police and the seizure of certain items

when the police were ordered to leave because a large crowd had begun to gather. (Pet.'s Brief, 69.) There was a totally separate search, however, in petitioner's view, which he claims was ignored by both the trial court and the Missouri Court of Appeals. This was the search that occurred while petitioner and the other suspects were handcuffed in the kitchen but before the crowd had begun to gather. It was during this time that the revolver, later identified as belonging to the off-duty policeman who was killed at the tavern, was discovered. It is petitioner's claim that *Stone* v. *Powell, supra,* does not preclude federal habeas review because this particular issue was never fully and fairly litigated by the state courts.

Petitioner's claim is without merit. A full pretrial suppression was held (Resp.Exh. A-5). The issue of the legality of the search of the house was considered by the Missouri Court of Appeals despite their finding that the issue had not been properly presented for appellate review. *State of Missouri* v. *Johnson, supra, at* 519. The Court found that a valid and voluntary consent to the search was given by Toney and that the search of the house was justified by the "exigent circumstances" exception to the warrant requirement. (*Id.,* 529.) Either of these exceptions to the warrant requirement was sufficient to justify the entire search. The Court of Appeals' opinion, coming after a full suppression hearing in the trial court, forecloses further consideration of petitioner's Fourth Amendment claim. *Greenhaw* v. *Wyrick,* 472 F.Supp. 730, 736 (W.D.Mo. 1979). The possibility that a federal court might find differently on the merits is irrelevant. *Hines* v. *Auger,* 550 F.2d 1094, 1099 (8th Cir. 1977).[6]

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[6] Petitioner argues on the basis of *O'Berry* v. *Wainwright,* 546 F.2d 1204 (5th Cir.), *cert. denied,* 433 U.S. 911 (1977) that because factual findings were never made by the trial court on the motion to suppress it cannot be held that a full and fair hearing was had in the state court. The facts relating to Toney's consent and the presence of the crowd, however, were not disputed. In such a situation, *O'Berry* does not require federal habeas review.

For these reasons, petitioner's eighth ground for federal habeas relief should be denied.

GROUND NO. 9: DENIAL OF PRETRIAL DISCOVERY

Petitioner's ninth ground is that his right to due process of law guaranteed by the Fifth and Fourteenth Amendments was violated by the refusal of the trial court to order the prosecution to disclose the names and statements of eyewitnesses as recorded by the police, the identifications made by witnesses who viewed the lineups, the grand jury testimony of witnesses, and the reports of fingerprint comparisons.

On August 7, 1972, prior to trial, petitioner filed four motions requesting various forms of discovery as to the state's evidence. (Resp.Exh. A-1, 22-29.) The trial court ordered disclosure of all "material evidence known to the Prosecuting Attorney, which is or may reasonably be favorable to the defendant. . . ." Petitioner's motions to inspect the transcript of grand jury testimony and to inspect statements of witnesses given to the police were denied. The part of petitioner's motion for a subpoena duces tecum for reports of fingerprint comparisons was also denied. (*Id.*, 29-31.)

In January of 1973 petitioner filed a motion to compel compliance with the August discovery order. This motion was sustained after a hearing in which the court was informed by the prosecution that they knew of no evidence which could be construed as favorable to the petitioner. (*Id.*, 37.) Petitioner's motion to compel answers on depositions to questions regarding grand jury testimony was also denied. (*Id.*, 40.)

Petitioner raised this claim in his brief on direct appeal, but the Missouri Court of Appeals declined to review it for failure to comply with Mo.S.Ct. Rule 84.04(d). This rule required that allegations of error in appellate briefs include a statement as to wherein and why the court ruling was erroneous. *State of*

Missouri v. *Johnson, supra, at* 520. The affidavit by petitioner's defense attorney filed with the federal habeas petition stated that prior to the appeal no question had ever been raised as to the form of the brief written by him and that until the opinion was filed by the Missouri Court of Appeals he had no idea that there was anything insufficient about petitioner's brief. (Kimbrell affidavit, 2.)

Respondent argues that this procedural default committed on the state appellate level bars federal habeas review under *Wainwright* v. *Sykes, supra.* Because of the disposition on the merits which follows, this procedural issue is not reached.

Allegations of trial error are not reviewable on federal habeas corpus unless they rise to constitutional magnitude. *United States ex rel. Ted Means* v. *Solem,* No. 79-2017 (8th Cir. June 27, 1980). *DeBerry* v. *Wolff,* 513 F.2d 1336 (8th Cir. 1975). The error must have so infected the "entire trial that the resulting conviction violated due process." *Zemina* v. *Solem,* 438 F.Supp. 455, 469 (D.S.Dak, 1977), *aff'd,* 573 F.2d 1027 (8th Cir. 1978).

Petitioner is in essence arguing that the prosecution was required to disclose completely and in detail all the police investigatory work on the case. The Constitution does not require this. *Moore* v. *Illinois,* 408 U.S. 786 (1972). All that the Constitution requires is that the prosecution upon defense request disclose evidence which would be material either to the guilt or punishment of the defendant. *Brady* v. *Maryland,* 373 U.S. 83 (1963). The court in this case ordered the prosecution to disclose all evidence which might reasonably be considered favorable to the defendant (Resp. Exh. A-1, 29) and accepted the prosecution's representation that it had complied with the order. (*Id.,* 37.) Petitioner does not allege how the evidence which was not disclosed would be material to either his guilt or punishment, except to say that the grand jury testimony of Laura Miller may have revealed that a suggestive photographic confrontation had

occurred during that testimony. In light of the earlier conclusion that Miller's testimony was constitutionally admissible despite the possibility of suggestive confrontation procedures, it cannot be said that the failure to disclose Miller's grand jury testimony so infected the entire trial that petitioner's conviction amounts to a denial of due process.

The remaining undisclosed evidence, *i.e.* the names and statements of eyewitnesses, the lineup identifications made by eyewitnesses and the reports of fingerprint comparisons would presumably have been used by petitioner to support his defense theory that Alfred or Hill were among the robbers. As noted earlier, however, to show that fingerprints or eyewitness reports and identifications placed Alfred or Hill in the tavern, does not prove that petitioner was not in the tavern. Even if such information was available to the prosecution, its nondisclosure did not deny petitioner a fair trial.

For these reasons petitioner's ninth claim for habeas corpus relief is without merit.

GROUND NO. 10: TRIAL SECURITY

Petitioner's tenth ground for relief is that sometime before trial the trial judge secretly met with the prosecuting attorney and listened to recorded statements by police officers that petitioner was a dangerous revolutionary and black militant. (Resp. Exh. A-1, 53-54.) It is petitioner's claim that his federal constitutional rights to effective assistance of counsel and due process were violated when, as a result of the secret meeting, excessive, highly visible and prejudicial security measures were imposed at his trial.[7] The claim of prejudice resulting from the

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[7] Petitioner's original claim, before he amended the petition on June 25, 1980 to state the claim referred to above, was that the *ex parte* meeting itself resulted in a constitutional violation. After the Attorney General filed a response arguing a failure to exhaust his "judicial bias" claim, petitioner amended his petition to claim that

security measures at trial was considered on direct appeal and found meritless. *State of Missouri* v. *Johnson, supra, at* 514. It was also raised in petitioner's Rule 27.26 motion and denied review because of the determination on the merits on direct appeal. *Johnson* v. *State of Missouri, supra, at* 958.

The general rule regarding security measures at trial is that an accused has a right to be tried "in an atmosphere free of partiality created by the use of excessive guards except where special circumstances which in the discretion of the trial judge, dictate added security precautions." *Kennedy* v. *Cardwell* 487 F.2d 101, 108-109 (6th Cir. 1973), *cert. denied,* 416 U.S. 959 (1974). The concern is that the fundamental presumption of innocence may be weakened when a criminal defendant is not clothed with the physical indicia of innocence at trial. *United States* v. *Jackson,* 549 F.2d 517, 526-27 (8th Cir.), *cert. denied sub. nom., Hudson* v. *United States,* 413 U.S. 923, also *cert. denied sub. nom., Mims* v. *United States,* 431 U.S. 968 (1977).

Uniformed officers were present on the floor of the courthouse during trial. (Resp.Exh. A-1, 53-54.) The jury panel was led through doors watched on either side by a uniformed officer. (*Id.,* 111.) It was stated by the court that four uniformed officers were assigned to the case. (*Id.,* 205, 206.) At the conclusion of the state's evidence, petitioner was removed from the counsel table and seated in the front bench of the courtroom, between two plainclothes guards seated some feet away. Petitioner was not shackled in any way. (Resp.Exh. A-4, 1093.) Three police vehicles escorted the sequestered jury from their lodgings. (Id., 1319-1327).) In response to defense objection to some of these measures, prior to voir dire, the court replied, "Overruled. Let the record show that the Corut deems the

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the constitutional violation occurred when, as a result of the meeting, the security measures were imposed. Petitioner's due process claim as regards judicial bias is therefore not reached and the claim is treated solely as one of unreasonable and prejudicial trial security. The Missouri courts have never heard the judicial bias claim.

measures which have been taken necessary because of the fact that the Court has been advised that the defendant is a member of an organization—an organized group of which a number of members are not confined." (Resp.Exh. A-1, 53.)

The security measures employed were not so unreasonable or prejudicial to amount to an abuse of discretion of constitutional magnitude. The presence of uniformed officers at the doors of the courtroom and on the floor of the courthouse is not so unusual or so obviously connected with a conclusion about the trial inside the courtroom to cause a weakening of the presumption of innocence in the jury's mind. The guards inside the courtroom were in plain clothes and there is nothing in the record which indicates that they could have been identified as guards. The only security measure which arguably could have had an effect on the jury's impartiality was the police escort. In light of the judge's information, this security measure was reasonable to protect the jury. It is not unusual for the police to escort a sequestered jury and the members of the jury may well have believed the measure to be normal procedure. Considering the special circumstances, it was not an abuse of discretion of constitutional magnitude to take added security precautions, expecially where all the obvious security measures were employed outside the courtroom and not directly connected to petitioner. Under these circumstances, petitioner was not deprived of the indicia of innocence at his trial.

For the reasons stated above, petitioner's tenth ground for habeas relief is without merit.

RECOMMENDATION

For the reasons set out above, it is the recommendation of the undersigned United States Magistrate that the petition of Theodore Roosevelt Johnson for a writ of habeas corpus be denied. The parties have ten days within which to file written objections to this Report and Recommendation.

Respectfully submitted,

David D. Noce
UNITED STATES MAGISTRATE

Dated this 29th day of September, 1980.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-1507 C(1)

Theodore Roosevelt Johnson, Jr.,
Petitioner,

v.

Donald Wyrick, Warden, Missouri State Penitentiary,
Respondent.

ORDER

In accordance with the Memorandum of the Court filed herewith and the Report and Recommendation of the United States Magistrate filed on September 22, 1980,

IT IS HEREBY ORDERED that the petition of Theodore Roosevelt Johnson, Jr., for a writ of habeas corpus be and it is denied. The action is dismissed.

/s/ H. Kenneth Wangeline
United States District Judge

Dated this 28th day of October, 1980.

MEMORANDUM

On September 29, 1980 the United States Magistrate recommended that the petition of Theodore Roosevelt Johnson, Jr., for a writ of habeas corpus under 28 U.S.C. §2254 be denied.

Petitioner has filed written objections to this recommendation. Although the Court believes the Magistrate recommended the correct determinations, several of petitioner's objections warrant comment.

Petitioner objects to the Magistrate's conclusion that his *Jackson* v. *Denno,* 378 U.S. 368 (1964), claim is barred by procedural default under *Wainwright* v. *Sykes,* 433 U.S. 72 (1977). It is petitioner's claim that the Magistrate ignored the fac that despite the vagueness of defense counsel's objection both the trial judge and the prosecution understood the objection to mean a demand for a hearing outside the presence of the jury on the voluntariness of the admitted statement. If the trial judge and prosecutor so understood the objection, petitioner argues that the procedural default doctrine of *Wainwright* is inapplicable under *Picard* v. *Connor,* 404 U.S. 270 (1971) and *Collins* v. *Auger,* 577 F.2d 1107 (8th Cir. 1978), *cert. denied,* 439 U.S. 1133 (1979). (*See* Report, 10-11 n.3.)

It cannot be said from this record that the prosecution and the judge understood that defendant was claiming a right to a *Jackson* v. *Denno, supra,* hearing. The objection was phrased, "I would ask here out of the presence of the jury a ruling on the relevancy and admissibility of the statement." The prosecutor then informed the judge that the police officer would testify that the statement was made spontaneously, not in response to any question by the officer. The judge responded "In other words, its exculpatory in nature rather than incriminating?" The prosecutor replied, "that's correct." After an off-the-record discussion, the request was denied.

Petitioner argues that the only possible meaning attributable to the objection is a request for a *Jackson* v. *Denno* hearing. In petitioner's brief to the Missouri Court of Appeals on his direct appeal, however, petitioner's trial counsel argued that in addition to the trial court's failure to hold a voluntariness hearing, the court erred in admitting the statement on relevancy grounds

because it referred to a separate crime. The attorney stated in the brief that

> Moreover, there was no evidence that the statement was in any way related to the instant case and, in fact, there was substantial reasons to believe that it was not. * * * It is far more likely that these defendants were suspects in other crimes, including one in which another police officer was killed . . . and that the alleged statement referred to one of these crimes. This likelihood is bolstered by the words attributed to appellant by Sgt. Bokal: "They can't get me for *that*: I was in the workhouse when *that* pig was killed." Significantly, there was no reference to more than one person being killed, nor to other persons being shot or stabbed, nor to a robbery, nor to a tavern.

Brief for Appellant, *State of Missouri* v. *Johnson, supra.* (Resp.Exh. B-1, 164-165.) This appellate argument by the attorney who made the trial objection suggests the possibility that the request for a hearing outside the presence of the jury on the relevancy and admissibility of the statement was a request by the attorney for the opportunity to explain outside the hearing of the jury that the statement referred to another police killing. It is significant to note in this regard that after an off-the-record discussion the trial judge denied petitioner's request but subsequently admonished the attorneys not to refer to the statement in final arguments. (Resp.Exh. A-4, 1091.)

It cannot therefore be said that Missouri courts have had a fair opportunity to rule on this claim. The record simply does not support a conclusion that despite the vagueness of the objection the trial court understood that petitioner was claiming a right to a *Jackson* v. *Denno* hearing. The trial judge apparently overruled the objection on the grounds that the statement was relevant as an exculpatory statement probative of a consciousness of guilt. *State of Missouri* v. *Johnson, supra, at* 507. Petitioner's failure to object with sufficient specificity and

failure to preserve the claim in his motion for new trial therefore bar his claim from consideration by this court under *Wainwright* v. *Sykes, supra,* as discussed in the Report and Recommendation.

As an alternative, petitioner argues that his attorney's failure to properly object and to preserve the issue for appeal form a basis for habeas relief on the ground of ineffective assistance of counsel. An ineffective assistance claim requires a showing of prejudice. *Witham* v. *Mabry,* 596 F.2d 293, 298 (8th Cir. 1979). As in *Witham,* the petitioner has not even attempted to explain how he was prejudiced by the attorney's failure to properly object, and his claim should therefore be rejected.

It appears from the record that petitioner could not make a sufficient showing of prejudice. The officer who testified to petitioner's statement was examined as to the circumstances of the statement and testified that the statement was unsolicited (Resp.Exh. A-3, 884-86) and was made subsequent to the giving of *Miranda* warnings. (Id., 754.)

Petitioner has also objected to the Magistrate's conclusion that petitioner's due process rights to discovery of informant identification were not denied under *Roviaro* v. *United States,* 353 U.S. 53 (1957). The Magistrate determined that if the Constitution requires a Roviaro balancing when a request for the disclosure of the identity of an informant is made, the facts before the state trial court were sufficient to support such a balancing and to support the trial court's denial of the request. (*See* Report, 15-17.) Petitioner claims that because the state trial court lacked certain information such as the role of the informants as witnesses or participants in the crime, the judge could not have performed the balancing of the defendants' needs as against the state's interest in maintaining secrecy as outlined in *Roviaro.*

Petitioner's argument is without merit. There is nothing in this record which supports the conclusion that the informants

did anything more than inform the police that a certain car may have been used in the crime and inform the police that Alfred was one of the robbers. Neither the car nor Alfred were ever connected with the crime. Petitioner argues that the lack of evidence concerning the informants supports his claim. It does not. Federal courts have consistently held that the Constitution does not require the disclosure of an informant who was not an actual participant in or witness to the offense charged. *See, e.g., United States* v. *Skeens,* 449 F.2d 1066 (D.C. Cir. 1971). The burden is on the petitioner to establish that the identity of the informant is necessary to his defense. *Id., United States* v. *Alvarez,* 472 F.2d 111 (9th Cir. 1973). Mere speculation that the informer might possibly be of some assistance does not meet that burden. *Lannom* v. *United States,* 381 F.2d 958 (9th Cir. 1967), *cert. denied,* 389 U.S. 833 (1968). Petitioner's claim is therefore without merit.

The rest of petitioner's objections are also without merit. The petition for a writ of habeas corpus will be denied.

/s/ H. Kenneth Wangelin
United States District Judge

Dated this 28th day of October, 1980.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-2136

Theodore Roosevelt Johnson, Jr.,
Appellant,

v.

Donald Wyrick,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: May 21, 1981

Filed: July 20, 1981

Before GIBSON, Senior Circuit Judge, ARNOLD, Circuit Judge, and McMANUS, District Judge.*

GIBSON, Senior Circuit Judge.

Theodore Roosevelt Johnson, Jr. appeals the denial of his petition for a writ of habeas corpus to release him from im-

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* The Honorable Edward J. McManus, Chief Judge, United States District Court for the Northern District of Iowa, sitting by designation.

prisonment in the state of Missouri. We affirm the district court's[1] denial of relief.

On February 1, 1973, Johnson was convicted by a jury of two counts of first degree murder, two counts of assault with intent to kill with malice, and two counts of first degree robbery by means of a dangerous and deadly weapon. He was sentenced to two concurrent life terms and to four concurrent terms of ninety-nine years, the latter to run consecutively to the life terms. His conviction was affirmed on direct appeal to the state appellate court in a twenty-one page published opinion. *State* v. *Johnson,* 539 S.W.2d 493 (Mo. Ct. App. 1976), *cert. denied,* 430 U.S. 934 (1977). Johnson's petition for state post-conviction relief under Missouri Supreme Court Rule 27.26 was dismissed without a hearing by the trial court. The dismissal was affirmed by the state appellate court. *Johnson* v. *State,* 574 S.W.2d 957 (Mo. Ct. App. 1978). On December 18, 1979, Johnson filed a petition for habeas relief in the United States District Court for the Eastern District of Missouri. The cause was referred to Magistrate Noce for review and recommendation. On September 29, 1980, Magistrate Noce filed a twenty-eight page written report recommending denial of the petition. On October 28, 1980, Chief Judge Wangelin, after reviewing the state court record and the magistrate's report, concluded that the habeas petition was without merit and denied the petition.

The state trial record convincingly demonstrates that shortly before 1:30 a.m. on March 18, 1972, Johnson and four other black males armed with various weapons, including sawed-off shotguns, entered and robbed a tavern and sixty of its customers in Maplewood, Missouri, a suburb of St. Louis. During the robbery, two patrons of the tavern were killed, one by a stab wound and the other, an off-duty police officer, by a shotgun blast into

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[1] The Honorable H. Kenneth Wangelin, Chief Judge, United States District Court for the Eastern District of Missouri.

his head. In addition, a barmaid was stabbed and a patron was shot in the knee and hip.

Later that same morning (about 7:00 a.m.), based upon information given by a local resident, police officers spoke with Robert Toney on the porch of a house where he had been located. Toney granted the officers permission to enter the house. Upon entering, the officers noticed a shotgun butt on the floor of the bedroom which also contained two black males, including Johnson. Toney, Johnson, the other individual in the bedroom, and a male found in the bathroom were all arrested around 7:30 or 8:00 that morning. The house was then searched. Among other weapons, the officers found the murdered policeman's gun and holster. A bag full of loot taken in the robbery, including wallets, purses, and credit cards, was also seized. Johnson's fingerprint was found on a check-cashing card belonging to one of the victims and on an unidentified wallet.

Finally, Johnson was identified at trial by two barmaids who testified at trial that Johnson had come into the bar late Friday afternoon, March 17, St. Patrick's Day, to purchase popcorn or potato chips. Johnson was also identified by one of these barmaids as having stood across from her, holding a shotgun during the robbery. Two patrons also identified Johnson as one of the robbers.

In his appeal from the district court's denial of habeas relief, Johnson alleges (1) that the in-court identifications were tainted and unreliable; (2) that his right to due process was violated when the trial court refused to order disclosure of the identities of a confidential informant and the police officer who spoke with a confidential informant; (3) that the state trial court erred in the manner in which it obtained information concerning the potential need for security at trial; (4) that his right to due process was violated when the trial court refused to order a continuance in the case and later refused to order a two-day recess; and (5) that his right to due process was violated by the state's

refusal to disclose certain material purportedly in its possession. We find these allegations to be without merit and affirm the district court's denial of habeas relief.

Before we address the merits of Johnson's appeal, we note the limited review power of the federal courts in habeas proceedings over state court factual findings. As recently stated by the Supreme Court in *Sumner* v. *Mata*, ____ U.S. ____, ____, 66 L.Ed.2d 722, 733 (1981) (footnote omitted):

> Congress in § 2254(d) intended not only to minimize that inevitable friction [between state and federal courts] but to establish that the findings made by the state court system 'shall be presumed to be correct' unless one of seven conditions specifically set forth in § 2254(d) was found to exist by the federal habeas court. If none of those seven conditions were found to exist, or unless the *habeas* court concludes that the relevant state determination is not 'fairly supported by the record,' 'the burden shall rest upon the applicant to establish *by convincing evidence* that the factual determination by the State court was erroneous.' (Emphasis supplied.)

This presumption of correctness applies to factual determinations made both by the state trial court and by the state appellate court after having reviewed the trial court record. *Id.*, ____ U.S. at ____, 66 L.Ed.2d at 730.

In-court identification

On appeal, Johnson contends that the in-court identifications of him by the barmaid and the two patrons were based upon a pretrial identification procedure that was so unduly suggestive and unreliable as to deny him due process of law. Specifically, Johnson contends that the use of a photographic display, in which the five robbers' single photos were mounted on a cardboard poster and shown to the witnesses in preparation for trial, rendered unreliable the in-court identifications. In the district

court and in the state appellate court, Johnson also argued that the original lineups, and a photograph and videotape of the lineups, shown shortly after the robbery, were also unduly suggestive. The state trial court on page 46 of the trial transcript, as well as the state appellate court, 539 S.W.2d at 519, and the federal magistrate on page 13 of his report, found the lineups to be proper and non-suggestive. We agree. Apparently Johnson does not appeal this factual finding, but contends only that the subsequent cardboard photographic display containing his picture, which the prosecutor used in preparation for trial, rendered the in-court identifications inadmissible. We disagree.

The state appellate court addressed this issue in its dismissal of Johnson's direct appeal. The court concluded:

> Although defendant attacks on various grounds every single viewing of himself or his likeness by all witnesses who testified, a substantial portion of his attack is directed at testimony as to occasions during preparation for trial at which witnesses were shown photographs of defendants by the prosecuting attorney. If initial identification procedures were not improper or impermissibly suggestive, they were not violative of defendant's constitutional rights. In addition, if subsequent in-court identifications of appellant are found to have a basis independent of any improper procedure, such identifications are admissible despite potentially suggestive pre-trial identification procedures. *State* v. *Ross,* 502 S.W.2d 241, 246[2] (Mo.1973); *State* v. *Taylor,* 496 S.W.2d 822, 824[3, 4] (Mo.1973). Because it was not error to admit identificaton testimony on the above stated basis, it is unnecessary to review here each step in the prosecuting attorney's preparation of this case subsequent to initial identifications of defendant by these witnesses. Not finding any evidence that would have required suppression of the witnesses' identification testimony, the point is ruled against defendant.

State v. *Johnson,* 539 S.W.2d at 519. The state appellate court, therefore, made a factual finding that the witnesses' in-court identifications were independent of any improper procedure. Also, the initial lineups were conducted prior to the complained-of identification procedures.

While we agree that the use of the cardboard photo displays was somewhat suggestive,[2] "the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.' *Simmons* v. *United States,* 390 U.S., at 384." *Neil* v. *Biggers,* 409 U.S. 188, 198 (1972). The question becomes whether the in-court identification was reliable under the "totality of the circumstances" even though one aspect of the confrontation procedure was perhaps somewhat suggestive. As stated in *Neil* v. *Biggers,* 409 U.S. at 199-200, and in *Manson* v. *Brathwaite,* 432 U.S. 98, 114 (1977), the court must consider the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the amount of time between the crime and the confrontation.

In this case we deal with the narrow question of the effect which the cardboard photo display had on the in-court identificatons. The cardboard display was used at a mock-up of the robbery, held about two months after the event and after positive identifications, which occurred shortly after the crime was perpetrated, had already been made. This case does not involve a question of an attempt by the prosecutor to introduce the out-of-court cardboard photo display identification of Johnson as direct evidence.

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[2] We note that the poster contained photos of all five robbers. The witnesses each identified only two of the photos. The five-photo display was therefore much less suggestive than a single-photo display. Probably no witness could have seen all the robbers so as to identify all of them. Thus the witnesses were careful and selective in their identifications, identifying only those robbers they had an opportunity to observe during the course of the robbery.

Returning to the *Neil* v. *Biggers* factors, we find that the three witnesses testified that they identified Johnson during the robbery. Additionally, two of the three witnesses, the barmaid and a female patron, testified at trial that they positively identified Johnson as one of the robbers at the non-suggestive lineups held shortly after the robbery.[3] The third witness testified that he identified Johnson in a photograph and video tape shown to him while he was hospitalized from injuries received during the robbery. The barmaid testified that during the robbery Johnson stood almost directly in front of her under a bar light for almost three minutes. In addition, she testified that Johnson had previously entered the bar that afternoon to buy popcorn or potato chips. The female patron testified that she viewed Johnson as he walked past her table. Johnson was a black male and carried a shotgun during the robbery. Both of these factors were unusual at the tavern and caused the two witnesses to focus their attention on Johnson's presence. These witnesses had also identified Johnson at the lineup prior to being shown the somewhat suggestive cardboard photo display.[4] Under the "totality of the circumstances," the identifications of Johnson were reliable. In retrospect, it would have been better had the witnesses not been shown the cardboard photo display prior to trial. "However, the defect, if there be one, is not of constitutional dimension." *Bivens* v. *Wyrick,* 640 F.2d 179, 181 (8th Cir. 1981). We therefore agree with the state appellate court's finding that "it was not error to admit identification testimony" based on the original lineups. *State* v. *Johnson,* 539 S.W.2d at 519.

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[3] Johnson argues that the barmaid's identification of him at the initial lineup is questionable. At trial, the barmaid testified that she identified Johnson at the time of the lineup. Johnson produced rebuttal witnesses that implied the barmaid did not identify Johnson. This issue, however, goes to the credibility of the barmaid and not to the constitutionality of the lineup procedure itself.

[4] *See* note 3, *supra.*

Informant identity

Johnson next contends that the state trial court violated his right to due process in refusing to order disclosure of the identity of a confidential informant and that of the police officer who spoke with a confidential informant. The confidential informant supplied information to a police officer to the effect that a blue Chevrolet may have been used in the robbery. The trial court refused to order disclosure of the informant's identity. A confidential informant[3] also supplied information concerning Robert Alfred, who was arrested when he arrived at the house where Johnson was found in the bedroom. The charges against Alfred were later dropped. The state trial court refused to order the identification of the police officer who obtained the information from the informant.

The state appellate court reviewed the trial judge's actions and the circumstances surrounding the informant's activities. The appellate court made the following factual findings:

> The officer testified that the informant was not a witness. There is no evidence that he was a participant. Neither of the alleged informant's tips, that regarding the blue Chevrolet and that leading to Alfred's arrest, were demonstrated to have led to defendant's arrest or conviction nor was it shown that any evidence discovered as a result of the alleged tips was used against this defendant at his trial. The police were unable to establish what car, if any, was used, and Alfred was released for lack of evidence.

* * * *

[3] It is possible that this informant was the same individual who supplied information concerning the blue Chevrolet.

> Taking into consideration the facts and circumstances of this case and the flexible standards set forth in *Roviaro,* we do not believe that it was error to deny the request for disclosure. There is no indication here, as there has been in the cases in which the court compelled disclosure or dismissal, that the informant took part in the event or was even present.

State v. *Johnson,* 539 S.W.2d 509-10.

These findings are entitled to a presumption of correctness. *See Sumner* v. *Mata,* ____ U.S. at ____, 66 L.Ed.2d at 733; *ante* at 4. This court has recently restated the relevant criteria for disclosure under *Roviaro* v. *United States,* 353 U.S. 53, 60-62 (1957). In *United States* v. *Skramstad,* No. 80-1941, slip op. at 10 (8th Cir. June 8, 1981), Judge McMillian stated:

> Nor do we think that disclosure of the identity of the informant as a material defense witness was necessary under *Roviaro* v. *United States,* 353 U.S. 53, 60-61 (1957). The informant in the present case was a mere 'tipster.' The informant simply provided the police with information and did not witness or participate in any drug transaction. *See United States* v. *House, supra,* 604 F.2d at 1140. 'In cases involving the "tipster" type of informant, who merely conveys information to the government but neither witnesses nor participates in the offense, courts generally hold that disclosure is not material and therefore not required.' *United States* v. *Barnes,* 486 F.2d 776, 778 n.3 (8th Cir. 1973) (citations omitted).

In this case, also, the informant was a mere "tipster." Furthermore, the relevance of the tip itself is questionable in light of the fact that the car and Alfred were never directly linked to the robbery. We agree with the state appellate court's finding that there is no indication "that the informant took part in the event or was even present." *State* v. *Johnson,* 539 S.W.2d at 510.

We are concerned, however, with the trial court's refusal to order disclosure of the identity of the police officer who received the tip. Ordinarily the identity of the police officer should be disclosed, so long as he himself is not acting in an undercover capacity, in situations where disclosure might jeopardize his safety. We have reviewed the trial court transcript; it reveals that the following exchange occurred:

> MR. KIMBRELL: Your Honor, at this time I will ask this [the police officer's identity] be disclosed as to defendant, as to information being favorable to defendant on the order of Judge Ferriss.
>
> THE COURT: The request is denied. Mr. Kimbrell, if I understand it, this information involves the question of Alfred being involved?
>
> MR. KIMBRELL: Beg your pardon?
>
> THE COURT: The request is denied.

It is apparent to us that the trial court denied Johnson's request for the identity of the police officer, not on grounds of privilege, but rather on the grounds of relevancy, namely, that Alfred's possible involvement in the robbery had not been demonstrated to the extent necessary to justify this collateral inquiry. We agree, and find that the trial court did not commit any constitutional error in this regard.

Trial security

Johnson next alleges that the state trial court erred in the manner in which it obtained information concerning the potential need for security at trial.[6] Johnson does not allege that the

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[6] In his brief, Johnson alleges that the state trial court held a secret, *ex parte* pretrial conference with law enforcement officers, wherein allegations were made that he was a "militant" and a tape recording was played wherein his voice exhorted listeners to racial violence. Johnson, however, has not presented any evidence to support these allegations.

trial judge was biased against him in any manner as a result of information he received. Appellant's brief at 25 n.8. Nor does Johnson vigorously complain that the security measures were unjustified, although he does state that he may have been prejudiced by the security arrangements.

On direct appeal, the state appellate court held that the presence of four uniformed policemen outside the courtroom and two plain-clothes security officers inside the courtroom was "not unreasonable in light of the circumstances." *State* v. *Johnson,* 539 S.W.2d at 514. The federal magistrate in his report and recommendation came to the same conclusion. We also agree. The state trial judge had a duty to see to it that proper security was provided to protect the defendant, the witnesses, and all others properly attending or participating in the trial. He performed that duty well within the bounds of discretion. We find that no prejudice resulted from the security measures imposed by the state trial court. We hold, therefore, that if the state trial court may have erred in the manner in which it received information concerning the necessity for security, the error was harmless beyond a reasonable doubt. *See Chapman* v. *California,* 386 U.S. 18, 24 (1967).

Continuances

Johnson contends that the state trial court violated his right to due process when it refused to delay the start of his trial until Nathaniel Heard, a potential state's witness in another defendant's case, could be found. In addition, Johnson argues that the trial court erred in refusing to grant a two-day continuance during trial so that his expert on whether he had fired a gun at the time of the robbery could be more readily available. The state appellate court, on direct appeal, rejected both of these arguments. *State* v. *Johnson,* 539 S.W.2d at 505-06.

Johnson argues here, as he did before the state appellate court, that Heard's testimony was relevant to the extent that it

may have supported his defense theory. According to Johnson, Heard presumably would testify to the effect that only four robbers were present.[7] The state appellate court found that "[t]he prosecution's evidence established that five persons participated in the offense. Proving that Davis, Hill, Toney and Jones were there would not establish that Johnson was not." *Id.*, 539 S.W.2d at 506. We agree. Johnson's trial had already been postponed three times—twice at Johnson's request. The state trial court committed no error in refusing a third request, made less than one week before the scheduled start of the trial.

Johnson also contends that the state trial court erred in refusing to grant a two-day continuance near the end of the trial so that his expert, on whether Johnson had fired a gun, could fly in from California to rebut the testimony of the state's expert. Johnson's expert, according to the offer of proof, would testify that the amount of chemicals found on Johnson's hands was consistent with this occupation as a mechanic. At trial, Johnson used a letter written by his expert in an attempt to impeach the state's expert.

In the trial of this case, which lasted over a week, the jury was sequestered. At the time Johnson made his motion for a continuance, the record does not reveal why his expert would not be available until two days later. This court cannot imagine many circumstances that would be more pressing than a murder trial involving a sequestered jury. In this age of jet travel, Johnson's expert should have been available to testify on less than a day's notice, barring a personal tragedy.

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[7] Johnson also contends that Heard would testify that one of the robbers, Hill, fired the gun that killed the police officer. While it is not asserted that Heard was a witness to the crime, he reportedly claimed to overhear a statement made by Hill, who allegedly bragged about killing the police officer. At any rate, this assertion, even if true, would not affect Johnson's guilt under Missouri's felony murder law. *See post* at 13.

In any event, Johnson was able to partially rebut the testimony of the state's expert through cross-examination. In addition, as noted by the state appellate court and the federal magistrate, under Missouri's felony murder law, MO REV. STAT. § 556.170 (1939) (current version at MO. ANN. STAT. § 562.041 (West 1979)), it was not necessary for Johnson to have handled or fired a gun in order for him to be found guilty. *Id.*, 539 S.W.2d at 506. The trial court did not err in denying the continuances. *See Ungar* v. *Sarafite,* 376 U.S. 575, 589 (1964).

Pretrial disclosures

Johnson's final contention on appeal is that his right to due process was violated by the state's refusal to disclose certain material purportedly in its possession. The federal magistrate's report dealt with this issue in the following manner:

> Petitioner is in essence arguing that the prosecution was required to disclose completely and in detail all the police investigatory work on the case. The Constitution does not require this. *Moore* v. *Illinois,* 408 U.S. 786 [, 794-95] (1972). All that the Constitution requires is that the prosecution upon defense request disclose evidence which would be material either to the guilt or punishment of the defendant. *Brady* v. *Maryland,* 373 U.S. 83 (1963). The court in this case ordered the prosecution to disclose all evidence which might reasonably be considered favorable to the defendant * * * and accepted the prosecution's representation that it had complied with the order. * * * Petitioner does not allege how the evidence which was not disclosed would be material to either his guilt or punishment, * * *.

On these grounds, the magistrate then found Johnson's argument to be without merit. We agree, and affirm on this issue on the basis of the magistrate's report.

In conclusion we note that Johnson has not challenged his conviction on the grounds of insufficient evidence, either before this court or on direct appeal to the state appellate court. *See State* v. *Johnson,* 539 S.W.2d at 500. The evidence adduced at trial demonstrated beyond a reasonable doubt that Johnson was guilty. *See Jackson* v. *Virginia,* 443 U.S. 307, 324 (1979). On the day of the robbery, Johnson entered the tavern and cased it, using the pretext of purchasing popcorn or potato chips. Later that evening he entered the tavern and held a shotgun on the employees and patrons while the robbery was in progress. The next day he was found in the house that contained the loot and the murdered policeman's gun. Johnson's fingerprints were found on some of the loot. In short, Johnson was a participant in a vicious crime that resulted in two deaths. He must now continue serving the sentence of imprisonment that both society and justice demand be carried out.

Affirmed.

A true copy.

ATTEST:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.